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CASE N0S.: 1999-CAA-00007, 1999-CAA-00008,
1999-CAA-00009 & 1999-CAA-00010

In the Matter of

DENNIS MCQUADE, COMMIE R. BYRUM,
VIRGINIA JOHNSON and **KENNETH WARDEN**
Complainants

v.

OAK RIDGE OPERATIONS OFFICE
U.S. DEPARTMENT OF ENERGY
Respondent

Appearances:

Loring E. Justice, Esquire, Oak Ridge, Tennessee,
for the Complainants[1]

Ivan Boatner, Esquire (Department of Energy, Office of
Chief Counsel),Oak Ridge, Tennessee, for the Respondents

Before: Daniel F. Sutton
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Jurisdiction

[1] Attorney Justice entered his appearance in this matter on February 28, 2000 after the Complainants terminated their relationship with their former lead counsel, Attorney Edward A. Slavin, Jr., in January 2000. Administrative Law Judge Exhibits 66-70. Withdrawal of the Complainants' former co-counsel, Attorney Jacqueline O. Kittrell, was approved by order issued on June 13, 2000. Administrative Law Judge Exhibit 36. A third attorney, Lori A. Tetrault, Esq., who had previously entered an appearance as co-counsel with Attorneys Slavin and Kittrell, never formally requested to withdraw but has not participated in the proceeding. Subsequent to his termination as the Complainants' counsel, Attorney Slavin's request to be retained on the service list in this matter was granted by the Court. Administrative Law Judge Exhibit 31.

This matter arises under of 29 C.F.R. Part 24 which implements the employee protection provisions of the Safe Drinking Water Act ("SWDA"), 42 U.S.C. 300j-9(i); Water Pollution Control Act ("WPCA"), 33 U.S.C. 1367; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622; the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971; Clean Air Act ("CAA"), 42 U.S.C. 7622; the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. 5851; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9610. The matter is before the undersigned Administrative Law Judge pursuant to the Complainants' request for a hearing. 29 C.F.R. §24.4(d).

II. Background and Procedural History

The current cases represent the second round in a series of complaints filed by a group of employees at the Department of Energy ("DOE") Oak Ridge Operations Office ("ORO") in Oak Ridge, Tennessee against DOE, ORO, individual ORO managers and DOE's Office of Inspector General ("OIG"), alleging that the complainant employees have been discriminated against in retaliation for their engaging in whistleblower activities protected by various federal environmental laws. As there is a long history of animosity and litigation involving these parties, some discussion of the background giving rise to the current complaints is in order.

A. The Parties

ORO is responsible for carrying out various DOE nuclear activities, including uranium storage and the assembly and disassembly of thermonuclear weapons and weapons components. ORO and DOE will be collectively referred to herein as the "Respondent" since ORO, as a subdivision of DOE is subsumed in its parent agency and may not be held independently liable. *Varnadore v. Oak Ridge National Laboratory*, USDOL/OALJ Reporter (HTML), OALJ Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-ERA-1 (ARB June 14, 1996) at n.37, *aff'd sub nom Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998).

The Complainants are current or former ORO personnel security analysts who worked in the Personnel Clearance and Assurance Branch which was formerly headed by Patricia Howse-Smith, Branch Chief for Personnel Security. ORO's personnel security system is an important component in protecting and maintaining nuclear materials free from harm. *Johnson v. Oak Ridge Operations Office*, USDOL/OALJ Reporter (HTML), ARB No. 97-057, OALJ Nos. 1995-CAA-20, 21 and 22 (ARB September 30, 1999) ("*ORO I*").

B. The Prior Complaints

The first round of complaints, which were the subject of *ORO I*, were filed in April 1995 by Virginia Johnson, Kenneth W. Warden and Dennis McQuade, who alleged that ORO, the DOE Inspector General, and Ms. Howse-Smith had retaliated against them for engaging in whistleblower activities protected by the CAA, CERCLA, ERA, SDWA, SWDA and the TSCA. Specifically, the Complainants alleged that they were retaliated against because they expressed concerns to the OIG

and to congressional and FBI investigators that questionable individuals, including convicted felons, drug dealers and abusers, and persons with psychological problems, had their national security clearances granted or renewed in contravention of DOE personnel security regulations under Ms. Howse-Smith's supervision of the ORO personnel security operation. The Complainants alleged that they had raised concerns about organized criminal activity, including gambling, drugs and prostitution, and government contract fraud.

After an investigation, the Department of Labor's Wage and Hour Division[2] dismissed the complaints on the grounds that DOE was not a covered employer under the ERA, and that the complaints were untimely under the remaining statutes. The Complainants requested a hearing, and the matter was assigned to Administrative Law Judge Edith Barnett. On ORO's motion to dismiss, Judge Barnett ruled that the complaints under the ERA and TSCA were barred by sovereign immunity and ordered the Complainants to file supplemental submissions containing specific allegations of protected activities under the CAA, SDWA, SWDA and CERCLA. The Complainants responded to Judge Barnett's order by essentially asserting that their expression of concern over issuance of security clearances to unsuitable persons is protected under the environmental whistleblower laws because these unsuitable persons, through their work assignments in close proximity to bomb-grade uranium, radiation and toxic materials, posed a danger of environmental releases, spills, accidents and radiation exposure. Judge Barnett then issued a recommended decision and order in which she held that: (1) the Complainants' allegations of specific protected activities merely illustrated their concerns about the improper retention or granting of security clearances and therefore were not protected activities under the CAA, SDWA, SWDA, or CERCLA; (2) Johnson's complaint was untimely, but Warden's and McQuade's complaints were timely; and (3) claims could not be brought against Ms. Howse-Smith and the DOE Inspector General as individuals because they were not the Complainants' employers.

Upon review, the Administrative Review Board ("ARB") affirmed. The Board held that Judge Barnett had correctly dismissed the complaints brought under the ERA and TSCA on sovereign immunity grounds, relying on the Secretary's decisions in *Teles v. DOE*, USDOL/OALJ Reporter (HTML), OALJ Case No. 1994-ERA-22 (August 7, 1995) and *Stephenson v. NASA*, USDOL/OALJ Reporter (HTML), OALJ Case No. 1994-TSC-5 (July 3, 1995). *ORO I* at 7-8. The ARB also concurred with Judge Barnett's determination on the merits that the Complainants' security clearance concerns were not protected under the CAA, SDWA, SWDA, or CERCLA because nothing in those statutes relates to security clearance operations at places of employment. Thus, the ARB held, in agreement with Judge Barnett, that the Complainants' security concerns were unrelated to potential violations of the CAA, SDWA, SWDA, or CERCLA and, therefore, such concerns were not grounded in reasonably perceived violations of those statutes. *Id*. at 8-9. The ARB additionally held

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[2] Prior to March 11, 1998, investigation of environmental whistleblower complaints under 29 C.F.R. Part 24 was the responsibility of the Wage and Hour Division. The regulations were amended effective March 11, 1998 to provide, *inter alia*, that investigations would be conducted by the Assistant Secretary for Occupational Safety and Health. 63 Fed. Reg. 6621 (February 9, 1998).

that the Complainants' argument that people who have something questionable in their background are, *for that reason*, likely to engage in behavior at work which will endanger the environment amounted to "rank speculation of the sort that cannot support a claim of protected activity." *Id*. at 9, noting that the Complainants had not asserted that any of the persons who improperly granted security clearances had ever harmed or threatened to harm the environment. Accordingly, the ARB dismissed the complaints.

C. The Current Complaints

While their initial complaints in *ORO I* were pending before Judge Barnett, Johnson, Warden and McQuade filed additional complaints dated October 13, 1995, November 13, 1995, January 3, 1996, May 9, 1996, July 22, 1996, October 1, 1996, November 5, 1996, December 16, 1996, March 28, 1997, April 10, 1997 and June 13, 1997, alleging further instances of retaliation and that they had been subjected to a hostile work environment because they had filed their original complaints.[3] ALJX 1A-1E, 1G-1J, 2, 3, 4.[4] On May 23, 1996, Byrum filed a complaint, alleging that he also has suffered a hostile work environment because of his support of Johnson, Warden and McQuade. ALJX 1F. The new complaints were considered by the Wage and Hour Division, and in determination letters issued to the Complainants and their counsel on January 28, 1999, the Division's Assistant District Director found that the complaints did not warrant further investigation. ALJX 5-8.[5] Initially, the Assistant District Director determined that DOE was not an employer subject to the ERA and TSCA and that the complaints were not actionable against the DOE Inspector General and the individual respondents because of the absence of an employment relationship between these parties and the Complainants. *Id.* at 1. Finally, the Assistant District Director determined that the Complainants had not established a prima facie case warranting investigation because (1) there was no clear link between any of the issues raised by the complaints and negative environmental impact and (2) the filing of prior complaints under the environmental statutes did not constitute protected activity because the prior complaints had been dismissed based on a finding that the Complainants' activities were not protected. *Id.* at 2. By letter dated February 5, 1999, the Complainants' then counsel requested that the complaints be consolidated for a hearing before the Office of Administrative Law

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[3] The new complaints were filed against DOE, ORO, the DOE Inspector General and five individuals, Patricia Howse-Smith, Rufus Smith, Dan Wilken, Jennifer Fowler and Ivan Boatner, and alleged violations of the CAA, CERCLA, ERA, TSCA SWDA and SDWA .

[4] The documentary evidence of record will be referred to as "ALJX" for jurisdictional and procedural documents admitted by the administrative law judge, "CX" for documents offered by the Complainants, "RX" for documents offered by Respondent. Citations to the hearing transcript will be designated "TR."

[5] The Wage and Hour Division's determination letters did not address the last three complaints filed on March 28, 1997, April 10, 1997 and June 13, 1997 as they were filed after responsibility for investigations under the employee protection provisions of the Federal environmental statutes was transferred to OSHA. ALJX 5-8.

Judges. ALJX 9. The Complainants' request for consolidation of their cases was granted, and a hearing was scheduled for the week of June 7, 1999. ALJX 10-14.

In their letter requesting a formal hearing, the Complainants also moved for partial summary judgement on three issues: (1) that the DOE has no defense of sovereign immunity under the CAA, CERCLA, SWDA and SDWA; (2) that the complaints were all timely filed under the applicable limitation periods; and (3) that each complaint properly alleges retaliation for protected activity in filing, prosecuting and helping to prosecute a DOL whistleblower action. ALJX 41. DOE initially responded in opposition on February 18, 1999, urging that the motions be denied as unsupported by any cited authority, premature and/or too vague to be capable of response. DOE also cross-moved, pursuant to F.R.C.P. 12(e), for a more definite statement with regard to the nature of the Complainants' alleged protected activity. ALJX 78. By order issued on February 24, 1999, I deferred ruling on the Complainants' motion for partial summary judgement, and I ordered (1) the Complainants to file a specific description for each Complainant of the activities engaged in which were alleged to be protected and (2) the Respondents to file a statement of all factual allegations being contested and all legal defenses being asserted. ALJX 15. Pursuant to this order, the Complainants filed a "First Environmental Protected Activity Summary" which had been previously filed with Judge Barnett in *ORO I* and a "Second Summary of Environmental Protected Activity." ALJX 39, 40. The Respondents answered by filing a motion for summary dismissal, contending: (1) that the individual Respondents and the DOE Inspector General must be dismissed because there is or was no employment relationship between the Complainants and any of these Respondents; (2) that the Complainants have not engaged in protected activity; (3) that the complaints would constitute an improper creation of jurisdiction; and (4) that the Complainants had not established a *prima facie* case of discrimination under the environmental whistleblower statutes because they had not alleged or demonstrated that the Respondents took any tangible adverse action against them. ALJX 81. Alternatively, DOE urged that the complaints filed by McQuade on January 3, 1996 and December 16, 1996 should be dismissed on *res judicata* grounds because the issues raised in the January 16, 1996 complaint (alleged retaliatory security clearance investigation and psychiatric evaluation) were litigated before Judge Barnett in *ORO I.*, and because the issues raised in the December 16, 1996 complaint (alleged failure to give McQuade meaningful work giving him an unsatisfactory performance rating, denying him representation at a grievance meeting and obtaining approval for these actions at the highest levels of DOE), including the termination of McQuade's employment, were previously litigated in an administrative proceeding before the Merit Systems Protection Board ("MSPB"). *Id*. at 15-16, 20 n.5; ALJX 82.

On April 29, 1999, I issued an order which granted in part and denied in part the parties' motions for summary disposition. ALJX 19. The Complainants' motion for summary judgement on the issues of sovereign immunity and timeliness was granted since the Respondents asserted no defense on either ground. *Id*. at 3.[6] Summary judgement was also granted in favor of Johnson,

[6] Unlike *ORO I* where the ARB affirmed Judge Barnett's holding that complaints brought against DOE under the ERA and TSCA were barred by the doctrine of sovereign immunity, the Complainants' motion for partial summary decision alleged proper jurisdiction under the CAA,

McQuade and Warden on the issue of protected activity since I found that they had engaged in activity protected by 29 C.F.R. §24.2(b) when they filed and prosecuted their April 1995 environmental whistleblower complaints, notwithstanding the fact that those complaints were ultimately dismissed, and since DOE had not alleged specific facts showing that there is a genuine issue of fact requiring a hearing on this issue. *Id*. at 9.[7] However, summary judgement with respect to Byrum on the issue of protected activity was denied because the record was not clear regarding the nature of his assistance to the other Complainants in the filing and prosecution of the *ORO I* complaints, and DOE's motion for summary dismissal of Byrum's complaint was also denied because the motion was predicated on the rejected argument that activities undertaken in furtherance of the *ORO I* complaints are not protected. *Id.* at n.7. DOE's motion to dismiss the DOE Inspector General and the individual respondents was granted based on the absence of any employment relationship, but its motion for summary dismissal for lack of any tangible adverse action was denied based on *Varnadore v. Oak Ridge National Laboratory*, USDOL/OALJ Reporter (HTML), OALJ No. 1992-CAA-2 (Sec'y January 26, 1996) at 47-48 (finding the "abusive and hostile work environment" concept of discrimination developed in Title VII cases and approved by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) to be equally applicable to environmental whistleblower discrimination cases, and holding that tangible job detriment is not a prerequisite to proof of unlawful discrimination

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CERCLA, SDWA and SWDA. It is noted that the Secretary of Labor has held that the Congress, in enacting the CAA, CERCLA, SDWA and SWDA, waived the federal government's sovereign immunity from suit. *See Jenkins v. U.S. Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), OALJ No. 1992-CAA-6 (Sec'y May 18, 1994) at 1-5. Since it is clear that the Complainants may not assert claims against the Respondent under the ERA and TSCA, I have treated their motion for summary decision as also amending their complaints to delete the allegations that the Respondent violated the ERA and TSCA.

[7] I also found that Judge Barnett's recommended decision and order in *ORO I* constitutes a judgement on the merits for *res judicata* purposes and precludes relitigation of the issues decided therein regarding whether the Complainants' activities, which are detailed in their First Summary of Environmental Protected Activity, are protected. ALJX 19 at 9, citing *Billings v. Tennessee Valley Authority*, OALJ No. 1991-ERA-12 (ARB June 26, 1996), slip op. at 8. In view of this finding, I found no merit to DOE's argument that complaints in this matter must be dismissed to prevent the Complainants from improperly creating Department of Labor jurisdiction over matters which have no rational relationship to the environmental statutes. In this regard, I stated that jurisdiction will not be asserted over any national security complaint but rather over the issue of whether the Complainants were subjected to unlawful discrimination or retaliation because they commenced proceedings under the employee protection provisions, because they testified, participated or assisted in such proceedings, and/or because they otherwise engaged in activities which are protected under the environmental statutes. *Id*. at 9-10.

based on retaliatory harassment which creates an abusive or hostile work environment). *Id*. at 13-15. Finally, I found that *res judicata* barred relitigation of McQuade's allegation in his January 3, 1996 complaint that he was discriminatorily subjected to a security clearance interview and psychiatric examination as this issue had been previously litigated before and adjudicated by Judge Barnett, but I rejected DOE's claim that *res judicata* applies to the allegation in the December 16, 1996 complaint concerning the unsatisfactory performance rating because it did not appear from a review of the MSPB Administrative Judge's initial decision that the issue presented in the instant proceeding (*i.e*., whether the unsatisfactory rating was given to McQuade in retaliation for protected activities under the environmental whistleblower protection statutes) was litigated before the MSPB. *Id.* at 14-15.[8]

Following issuance of the order on the parties' motions, the hearing was continued several times, primarily due to the pendency of pre-hearing discovery issues which were addressed at length in an order issued on September 24, 1999. ALJX 23. After additional continuances were granted as a result of the Complainants' change of counsel, the matter came to be heard in Knoxville, Tennessee over a four-day period from July 18-21, 2000, at which time all parties were afforded an opportunity to present evidence and argument.[9] The Complainants appeared represented by counsel, and an appearance was made by counsel on behalf of the Respondent. Testimony was elicited at the hearing from 23 witnesses, and documentary evidence was admitted as ALJX 1-A through 1-J, 2 through 4, and 5 through 91; CX 1-39; RX 1- 40. TR 24-25, 27, 30.[10] The Respondent offered one additional exhibit during the hearing, RX 41. A ruling on this exhibit inadvertently was not made, and

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[8] Although not relied upon in the April 29, 1999 order, it is noted the *res judicata* could not have been applied to bar litigation of McQuade's December 16, 1996 complaint because the initial decision was pending MSPB review at the time that the Respondent's motion for summary dismissal was filed. *See Agosto v. Consolidated Edison Co. of New York, Inc.*, USDOL/OALJ Reporter (HTML), ARB Nos. 98-007 and 98-152, OALJ Nos. 1996-ERA-2 and 1997-ERA-54 (ARB July 27, 1999) at 7, citing *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987).

[9] The hearing had been scheduled to convene on Monday, July 17, 2000. However, that day had to be canceled when the Administrative Law Judge's arrival in Knoxville was substantially delayed due to inclement weather. Although this last-minute cancellation wreaked havoc on the parties' plans for the appearance of witnesses, both counsel exhibited a commendable degree of professionalism and cooperation in making the adjustments necessary to complete the hearing in four days.

[10] Counsel to the Complainants had objected to the authenticity of the Respondent's proposed exhibit RX 39 prior to the hearing, ALJX 77, but this objection was withdrawn at the hearing after the Respondent amended the proposed exhibit. TR 29. There remain, however, other issues with respect to this exhibit which will be addressed below.

RX 41 is now hereby admitted, noting the absence of any objection by the Complainants.[11] During the hearing, the Complainants' motion to amend their complaints to allege that the Respondent's conduct with respect to proposed DOE Exhibit 39 constitutes spoliation of evidence and further retaliation against the Complainants for their protected activity was allowed, and the following matters were taken under advisement: (1) the Complainants' motion for default judgement based on alleged spoliation of evidence and their motion for adverse inferences in regard to the testimony of Donat St. Pierre for violation of a sequestration order; and (2) the Respondent's motion for reconsideration of the prior denial of its motion for summary dismissal of the allegations arising from the unsatisfactory rating issued to McQuade and his removal from employment. Regarding this latter issue, the parties were advised that in the event that summary dismissal of this allegation was denied on reconsideration, the record would be reopened for the limited purpose of allowing the Respondent an opportunity to offer evidence in response to this allegation. At the close of the hearing, the following time frames were established: August 21, 2000 for offers of any additional evidence; September 5, 2000 for any objections to post-hearing evidence offered; and October 6, 2000 for submission of closing argument and proposed findings of fact. TR 1825-26. By order issued on July 28, 2000, the Respondent's counsel was allowed until August 21, 2000 to submit an affidavit in response to the Complainants' motion for sanctions relating to Respondent's Exhibit RX 39. This order also extended the deadline for submission of closing argument and proposed findings of fact to October 26, 2000.

Within the time frames established at the close of the hearing, the Complainants offered additional evidence as CX 40-47, to which the Respondent has raised no objection. Accordingly, CX 40-47 have been received in evidence. Pursuant to the July 28, 2000 order, counsel to the Respondent timely submitted his declaration concerning the circumstances surrounding the submission of proposed DOE Exhibit 39. On September 11, 2000, the Complainants moved to amend Warden's complaint to allege his non-selection for a job as a personnel security specialist as further evidence of post-complaint retaliation, stating that no new evidence, aside from the fact of Warden's non-selection, would be offered.[12] As an alternative to their motion, the Complainants stated that a new complaint concerning the non-selection had been filed with OSHA. By order issued

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[11] Respondent's Exhibit RX 41 is a copy of a decision issued by Administrative Law Judge William B. Devaney in *U.S. Department of Energy and Office of Professional Employees International Union, Local 268*, Case No. CH-CA-90297 (April 24, 2000) which involved a complaint of alleging that DOE engaged in unfair labor practices in violation of 5 U.S.C. §7116(a)(1) and (2) when it suspended an ORO employee who was the Union's Shop Chairman.

[12] Prior to the hearing, the Complainants' unopposed motion to amend Byrum's complaint to include an allegation that a proposed transfer in March 2000 was a further act of retaliation for Byrum's protected activity was granted by order issued on April 13, 2000, ALJX 33, and on May 18, 2000, the parties' joint motion was granted to further amend Byrum's complaint to include an allegation raised in a July 28, 1999 complaint filed with OSHA that he had been verbally reprimanded on June 28, 1999 in retaliation for his protected activities. ALJX 35.

on October 4, 2000, the Complainants' motion was denied based on my determination that allowance of the amendment would deprive the Respondent of due process by denying it any opportunity for a hearing on the allegation that Warden's non-selection was retaliatory. On October 17, 2000, the Complainants requested permission to file a reply brief, and on October 23, 2000, they requested clarification as to whether their counsel could (1) withhold a brief on the issue of McQuade's damages until after completion of any further proceedings and (2) withhold his application for fees until after completion of any further proceedings. By order issued on October 30, 2000, the parties were advised that in the event that the record were to be reopened, both parties would allowed an opportunity to submit written argument addressing the issue of McQuade's termination and that counsel to the Complainants could withhold filing his fee application pending a ruling on the Respondent's motion for summary dismissal and completion of any subsequent proceedings, if warranted. In addition, the Complainants' unopposed request to file a reply brief was granted.

The parties timely submitted their closing arguments, and the Complainants timely submitted their reply brief. The record is now closed. Upon consideration of the entire record, including the arguments advanced by the parties, I conclude that issues relating to McQuade's unsatisfactory rating and removal are barred on issue preclusion grounds by the prior adjudication before the MSPB. As to the Complainants' remaining allegations, I conclude that they have established that the Respondent engaged in acts prohibited by 29 C.F.R. §24.2(b) and thereby violated the employee protection provisions of the CAA, CERCLA, SDWA and SWDA by creating an abusive and hostile work environment in retaliation for the Complainants' protected activities in commencing the complaint proceedings in *ORO I*, testifying in such proceedings, or assisting or participating in such proceedings. In view of these conclusions, I will not reopen the record for hearing the Respondent's evidence on the allegations found barred by issue preclusion, and I grant the Complainants' counsel leave to file an application for fees and expenses which will be addressed in a supplemental recommended decision and order. *See Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, USDOL/OALJ Reporter (HTML), OALJ No. 1991-ERA-13 (Sec'y October 26, 1992) 14-15. My findings of fact and conclusions of law are set forth below.

III. Findings of Fact and Conclusions of Law

A. The Complaints

In total, the Complainants have filed 15 complaints alleging acts of post-complaint retaliation. One of these complaints, which was filed on January 3, 1996 alleging retaliation against McQuade by subjecting him to a security clearance interview on December 5, 1995 and by requesting that he submit to a psychiatric evaluation, ALJX 1D, is barred by *res judicata* from consideration herein based on my prior ruling that this allegation was previously litigated before and adjudicated by Judge Barnett. ALJX 19. The complaints currently before me are as follows:

(1) August 24, 1995 – alleging retaliation against McQuade by sending him a threatening letter dated August 17, 1995 (ALJX 1A);

(2) October 13, 1995 – alleging retaliation against McQuade by sending a psychiatric report to McQuade's earlier complaint to McQuade's then counsel on or about September 15, 1995 through a hotel facsimile machine with no reasonable expectation of privacy (ALJX 1B);

(3) November 13, 1995 – alleging retaliation against McQuade by issuing a reprimand on November 8, 1995 (ALJX 1C);

(4) May 9, 1996 – alleging retaliation against McQuade and Warden by holding a Personnel Security Branch Meeting on May 8, 1996 which was designed to chill protected activity (ALJX 1E);

(5) May 23, 1996 – alleging intimidation of Byrum during an interrogation on May 17, 1996 into his protected activity (ALJX 1F);

(6) July 22, 1996 – alleging retaliation and harassment of Byrum and Warden at a July 11, 1997 Personnel Clearance Branch meeting (ALJX 1G);

(7) October 1, 1996 – alleging a retaliatory suspension of Warden on October 1, 1996 (ALJX 1H);

(8) November 5, 1996 – alleging a retaliatory assignment of Warden to meaningless clerical work on of about October 5, 1996 (ALJX 1 I);

(9) December 16, 1996 – alleging continuing retaliation against McQuade by (a) giving non-meaningful clerical work for over one year, (b) giving him an unsatisfactory performance rating, (c) forbidding him union representation during a grievance meeting, and (d) obtaining approval for such actions at the highest levels of DOE (ALJX 1 J);

(10) March 28, 1997 – alleging retaliation against McQuade by placing him on a performance improvement plan on March 25, 1997 (ALJX 2);

(11) April 12, 1997 – alleging retaliation against Johnson, McQuade and Warden based on a recently-disclosed February 21, 1990 letter referring to the Complainants as "disgruntled employees" (ALJX 3);

(12) June 13, 1997 – alleging retaliatory firing of McQuade on July 12, 1997 (ALJX 4);

(13) July 28, 1999 – alleging a retaliatory reprimand was issued to Byrum on June 28, 1999; and

(14) March 2000 – alleging a retaliatory reassignment of Byrum in March 2000.

As noted above, motions to consider these later two allegations of post-complaint retaliation against Byrum were granted. ALJX 33, 35.

B. The Respondent's Motion to Dismiss

At the hearing and in its closing argument, the Respondent renewed its motion to dismiss McQuade's claims surrounding his job performance as barred by the doctrines of collateral estoppel and/or *res judicata*, and it offered as additional supporting evidence the final decision of the MSPB which issued on March 13, 2000. RX 9.

Collateral estoppel or "issue preclusion" is a concept included within the doctrine of *res judicata* which "refers to the effect of a judgement in foreclosing a relitigation of a matter that has been litigated and decided." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984) (*Warren City*). Issue preclusion may be applied "where the identical issue sought to be litigated was actually determined and necessarily decided in a prior proceeding in which the litigant against whom the doctrine is asserted had a full and fair opportunity to litigate the issue." *N.L.R.B. v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 81 (6th Cir. 1985) (*Master Slack*), citing, *inter alia*, *Montana v. U.S.*, 440 U.S. 147, 153 (1979) and *Park lane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). A factual issue is "necessarily decided" if its determination was necessary to support the judgement in the prior proceeding. *Master Slack* at 81. Issue preclusion may be invoked in administrative proceedings arising under the employee protection provisions of the environmental statutes provided that (1) the issue sought to be precluded must have been actually litigated, that is, contested by the parties and submitted for determination to the court, (2) the issue sought to be precluded must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial, and (3) application of the doctrine in the second trial must not work an unfairness. *Ewald v. Commonwealth of Virginia*, USDOL/OALJ Reporter (HTML), OALJ No. 1989-SDW-1 (Sec'y April 20, 1995) (*Ewald*) at 4, quoting *Otherson v. DOL*, 711 F.2d 267, 273 (D.C. Cir. 1983) and *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3rd Cir. 1981).

The other concept of *res judicata* urged by the Respondent is "claim preclusion" which "refers to the effect of a judgement in foreclosing litigation over a matter that has never been litigated, because of a determination that it should have advanced in an earlier suit . . . ." *Warren City*, 465 U.S. at 77 n.1. The claim preclusion branch of the doctrine has four elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties, or their privies, as the first; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) an identity of the causes of action. *Begala v. PNC Bank*, 214 F.3d 776, 779 (6th Cir. 2000); *Sanders Confectionery Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992).

The parties in the MSPB proceeding were the same as in the matter *sub judice*, namely, McQuade and the DOE. RX 8, 9. The issue litigated before the MSPB concerned McQuade's appeal pursuant to 5 U.S.C. §4303(e) from the "July 14, 1997 removal from the position he held as an Information Dissemination Specialist, GS-12, Department of Energy (DOE), Oak Ridge,

Tennessee . . . based on a charge of unacceptable performance . . . in one of the critical elements of his position." RX 8 at 2. The Respondent DOE had the initial burden of proving by "substantial evidence"[13] the following elements: (1) that its performance appraisal system had been approved by the Office of Personnel Management; (2) that McQuade's performance in one or more of his critical elements was unacceptable during the performance improvement period in that it failed to meed established standards; (3) that it gave McQuade a reasonable opportunity to improve his performance before removing him from his position; and (4) that it took the removal action under valid performance standards. *Id*. McQuade had the burden of proving by a preponderance of the evidence his affirmative defenses of race discrimination, disability discrimination, reprisal for having filed complaints of discrimination and having otherwise exercised his appeal rights, and retaliation for having engaged in whistleblowing activity. *Id*. at 3. After the Administrative Judge found that the Respondent had met its burden of establishing by substantial evidence the requisite elements to support a performance-based removal, she considered McQuade's affirmative defenses including his allegation that the removal action was taken in retaliation for his whistleblowing activities. Regarding McQuade's whistleblower defense, the Administrative Judge stated that he must prove by a preponderance of the evidence

[13] Substantial evidence is defined in the MSPB's regulations as the "degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons may disagree." 5 C.F.R. §1201.56(c)(1).

that he made a disclosure under 5 U.S.C. 2302(b)(8)[14] and that the disclosure was a contributing factor in the removal action. *Id.* at 16. The Administrative Judge considered McQuade's affirmative defense that the performance-based removal was motivated by considerations of his protected whistleblowing activity, noting that "[b]etween 1995 and 1997 he filed a number of environmental whistleblower complaints (13 in all) with the Department of Labor . . . ." *Id.* at 19. Regarding this activity, the Administrative Judge found,

> [T]here is no question that appellant had blown the whistle by reporting allegations that employees were receiving clearances who should not have them. Appellant began blowing the whistle on this issue in 1987, and continued to raise the same issues in appeals before DOL, EEO complaints, to congressmen, the IG, and the news media.

Id. at 22. However, while the Administrative Judge found that McQuade had engaged in protected whistleblowing activity, she concluded that he had not met his burden of proving that his protected whistleblowing activity was a contributing factor to the Respondent's decision to remove him form unsatisfactory performance:

> While timing is a factor to look at in making a contributing factor determination, in this case, because appellant's whistleblowing has been limited to two issues he has raised repeatedly between 1987, and 1997, and because it is clear from the above

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[14] Section 2302(b)(8) makes it a prohibited personnel practice to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

5 U.S.C. §2302(b)(8).

> summary that agency officials had a number of valid reasons to have removed appellant years ago, I find appellant has failed to show that his whistleblowing was a contributing factor in his removal. He has simply not shown any connection between his whistleblowing activity and his removal.

Id. at 24. McQuade appealed the Administrative Judge's initial decision to the MSPB which affirmed the Administrative Judge's initial decision. *McQuade v. Department of Energy*, 2000 MSPB LEXIS 291 (March 13, 2000); RX 9.[15]

Based on my review of the MSPB proceeding, I conclude that collateral estoppel applies to the issue of whether McQuade's unsatisfactory rating and removal constituted retaliation for his filing environmental whistleblower complaints with the Department of Labor. That is, the record shows that (1) this issue was actually litigated before the MSPB, (2) the issue was actually and necessarily determined by the MSPB which has jurisdiction to consider the issue of post-complaint retaliation as an affirmative defense to the removal action, and (3) noting that McQuade was represented by counsel at all times before the MSPB and had a full and fair opportunity to litigate the post-complaint retaliation issue, application of collateral estoppel to bar relitigation of that issue in this case will not work an unfairness.

Counsel to the Complainants advances several arguments against any application of *res judicata* to McQuade's claims. None are persuasive. First, it is argued that McQuade should not be precluded from litigating any issues in this case because his burden of persuasion was greater in the prior case before the MSPB. Complainants' Comprehensive Post-Hearing Brief at 71. Counsel does correctly point out that the Secretary in *Ewald* refused to give preclusive effect to a prior decision where the complainant's burden of persuasion in the prior proceeding was appreciably heavier than her burden in the subsequent whistleblower protection case. In *Ewald*, the complainant had simultaneously pursued her a whistleblower complaint before DOL and an action in Federal District Court alleging that her termination violated her constitutional rights of freedom of speech and association. The District Court rejected the complainant's constitutional claims because she did not

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[15] It is noted that in his appeal to the MSPB, McQuade moved to stay his appeal or dismiss his petition for review without prejudice, pending resolution of his DOL whistleblower retaliation claims. By order issued on July 27, 1999, the MSPB denied this motion, observing,

> [I]n his Board appeal the appellant raised affirmative defenses of discrimination and retaliation for filing the DOL complaint. Since these claims cannot be resolved before the DOL . . . , it is unlikely that a decision on the appellant's DOL whistleblower complaint will render further proceedings before the Board unnecessary.

McQuade v. Department of Energy, 83 M.S.P.R. 125, 127 (July 27, 1999).

satisfy the "but-for" standard articulated in *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990) (employment discrimination plaintiff must show that "but for" the employee's protected expression, the employer would not have taken the alleged retaliatory action). *Ewald v. Commonwealth of Virginia Dept. of Waste Management,* CA-90-494- R, 1991 U.S. Dist. LEXIS 15828 (E.D. Va. 1991), *aff'd* 972 F.2d 339 (4th Cir. 1992) (table). After an exhaustive review of burden allocation in environmental whistleblower cases, as well as in analogous employment discrimination cases arising under Title VII of the Civil Rights Act and the National Labor Relations Act, the Secretary concluded that "but for" burden of persuasion imposed by *Huang* is markedly different from the burden routinely applied in environmental whistleblower cases:

> Unlike the Fourth Circuit's "but-for" test under the First Amendment, under the environmental whistleblower provisions it is "enough that the protected expression played a role or was a motivating factor in the retaliation." Thus the environmental whistleblower complainant *never* has a "but-for" burden, however the *employer* in a dual motive case bears a "but-for" burden.

Ewald, USDOL/OALJ Reporter (HTML) at 6-7 (quotation marks and italics in original, footnote and citation omitted). Based on the "critical" distinction between the burdens Ewald had to carry in the two cases, the Secretary held that the prior adjudication of Ewald's constitutional claims did not have preclusive effect in her environmental whistleblower action. *Id*. at 10. However, there is no marked difference or critical distinction between the McQuade's burdens before the MSBP and in this case. Indeed, the burden assigned by the Administrative Judge, *i.e.*, that McQuade must prove that his protected environmental whistleblowing was a "contributing factor" is precisely the same burden he must carry to prevail on his environmental whistleblower discrimination complaints. *See Hasan v. Commonwealth Edison Co.,* USDOL/OALJ Reporter (HTML), ARB No. 00-043, OALJ No. 1999-ERA-17 (ARB December 28, 2000) at 4 (environmental whistleblower complainant has the "burden of proving that his protected behavior was a contributing factor in the personnel action."). Accordingly, *Ewald* is distinguishable and provides no support for declining to give preclusive effect to the prior MSPB decision. Also distinguishable is the Secretary's decision in *Jenkins v. U.S. Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), OALJ No. 1992-CAA-6 (May 18, 1994) which the Complainants cite as standing for the proposition that issue preclusion should not be applied because "unlike the Civil Service Reform Act administered by the MSPB, the environmental whistleblower statutes are liberally construed for the benefit of the employee." Complainants' Comprehensive Post-Hearing Brief at 71. *Jenkins,* however, was not a preclusion case because the complainant had not previously raised environmental whistleblower retaliation in another forum. Rather, it involved a claim by the respondent government agency that the Civil Service Reform Act ("CSRA") provided an exclusive remedy for the complainant's allegation that she had been unlawfully retaliated against for her protected environmental whistleblowing activities. The Secretary rejected the agency's claim that the CSRA impliedly repealed the employee protection provisions of the environmental statutes as they relate to federal employees. USDOL/OALJ Reporter (HTML) at 5. As the foregoing discussion shows, McQuade not only previously raised his claim of retaliation for protected environmental whistleblowing, including his claim of retaliation for filing whistleblower complaints with DOL, the issue was adjudicated by the MSPB using exactly the same

evidentiary burden that he would have to carry in a Part 24 complaint proceeding. Thus, contrary to McQuade's argument that the issues in the two proceedings are not identical and that the MSPB did not and could not have jurisdictionally reached the issue of post-complaint retaliation for filing whistleblower retaliation complaints, the record shows that McQuade raised the issue of whether the Respondent retaliated against him because of his protected environmental whistleblowing, including the filing of complaints with the DOL, and that this issue was decided by the MSPB.

McQuade next argues that the MSPB proceeding should not be given preclusive effect because to do so would result in a manifest injustice in view of the fact that he was unable to call any witnesses at the MSPB hearing due to his former counsel's failure to submit a witness list. Complainants' Comprehensive Post-Hearing Brief at 73. The MSPB's rules of practice and procedure provide that an Administrative Judge may impose sanctions necessary to serve the ends of justice. 5 C.F.R. §1201.43. In the case of a party's failure to comply with an order, the Administrative Judge may "prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought." 5 C.F.R. §1201.43(a)(2). The decision to impose sanctions relating to discovery and evidentiary issues is committed to the sound discretion of the MSPB and its Administrative Judges, and the courts will overturn the MSPB on such matters only where there is a clear and harmful abuse of discretion. *Baker v. Department of Health and Human Services*, 912 F.2d 1448, 1457-58 (Fed. Cir. 1990) (Administrative Judge acted within her sound discretion by striking appellant employee's witness list as a sanction for his failure to comply with a pre-hearing order establishing a deadline for submission of witness lists). Since McQuade has not shown that the MSPB Administrative Judge's imposition of sanctions amounted to an abuse of discretion, I conclude that granting preclusive effect to the prior MSPB proceeding will not produce any unfairness or manifest injustice. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401-2 (1981) (*res judicata* is animated by principles of finality rather than concerns for individual equity).

Finally, McQuade argues that application of collateral estoppel is inappropriate because of an intervening change in the relevant legal climate. Specifically, McQuade asserts that the Supreme Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) "represents a dramatic change in the law in that the very falsehood of an employer's explanation may be sufficient to sustain an employee's ultimate burden of proof. Complainants' Comprehensive Post-Hearing Brief at 76. The problem with this argument is that *Reeves* comes nowhere close to effecting a dramatic change in the law. *Reeves* involved a typical employment discrimination case where an employee attempts to prove intentional discrimination by indirect or circumstantial evidence, and the employer responds by producing evidence that it had legitimate, nondiscriminatory reasons for taking the challenged employment action. The Fifth Circuit had ruled that the employee's showing that the employer's reason was pretextual was insufficient, standing alone, to sustain a finding of intentional discrimination, 197 F.3d 688, 693-94, and the Supreme Court granted certiorari to resolve a conflict between the circuits as to whether an employee's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation

is adequate to sustain a finding of intentional discrimination. 530 U.S. at 140.[16] The Court pointed out that it was evident from its 1993 decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, that the Court of Appeals has misconceived the evidentiary burden borne by employees who attempt to prove intentional discrimination through indirect evidence. In this regard, the Court stated that while it had held in *St. Mary's Honor Center* that a factfinder's rejection of the employer's nondiscriminatory explanation does not *compel* a judgement for the employee, it had also stated that is *permissible* to infer the ultimate fact of discrimination from the falsity of the employer's explanation. 530 U.S. at 146-47. Thus, the Court concluded that "because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." 530 U.S. at 149. Rather than a dramatic change in the law, *Reeves* at most represents a clarification of the *St. Mary's Honor Center* holding. More importantly, because the MSPB Administrative Judge effectively held that McQuade had not even made a *prima facie* showing of discrimination, she never reached the issue confronted in *Reeves*. Under these circumstances, I find that *Reeves* does not constitute a "change in the law or other circumstances . . . such that preclusion would result in a manifestly inequitable administration of the laws." Restatement of Judgements, Second at §28.

For these reasons, I conclude that the issues raised in the complaints filed on December 16, 1996 relating to McQuade's unsatisfactory appraisal, and on June 13, 1997 relating to the McQuade's removal are barred from consideration herein on issue preclusion grounds because these issues were actually litigated before the MSPB and were actually and necessarily determined by the MSPB, a tribunal of competent jurisdiction, and because application if issue preclusion will not result in any unfairness. *Ewald* at 4. I further conclude that the issues raised in the December 16, 1996 complaint relating to McQuade's assignment to clerical work and the denial of union representation during an appraisal meeting, the issue raised in the March 27, 1997 complaint relating to McQuade's placement on a performance improvement plan are barred on claim preclusion grounds. Finally, I conclude that the issues raised at the hearing and in the Complainants' closing argument relating to the Respondent's alleged failure to properly equip and train McQuade and his allegedly retaliatory detail to perform unratable work in the Procurement and Contracts Division effective October 1, 1996, within days of the September 1996 broadcast of his second television interview, are also barred on claim preclusion grounds.

That is, there has been a final decision on the merits of McQuade's performance-based removal by the MSPB, a tribunal of competent jurisdiction. This instant proceeding involves the same parties as the MSPB case. The clerical work, denial of union representation and performance improvement plan allegations raised in this proceeding should have been litigated before the MSPB as they are clearly and necessarily inexorably a part of McQuade's claim that he was discriminated against because of his protected whistleblower activities. And, finally, there is an identity of the causes of

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[16] As noted by the Court, it was the law of the Sixth Circuit, in which this matter arises, that a *prima facie* case, combined with sufficient evidence to disbelieve the employer's nondiscriminatory explanation, always creates a jury question of whether the employer intentionally discriminated. 530 U.S. at 140, citing *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997).

action because the facts creating McQuade's affirmative defense of whistleblower retaliation and the evidence necessary to sustain this defense before the MSPB are identical to the facts and evidence necessary to prove a violation of the employee protection provisions. *See Sanders Confectionery Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 484 (6th Cir.1992) (Identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action.).

C. The Complainants' Request for Sanctions for the Respondent's Hearing Misconduct

1. Alleged Spoliation of Evidence – Respondent's Exhibit RX 39

As mentioned above in the summary of the case's procedural history, an unopposed motion to amend Byrum's complaint to include an allegation that a proposed transfer in March 2000 was a further act of retaliation for Byrum's protected activity was granted prior to the hearing. ALJX 33. Specifically, Byrum alleged that he had been informed by Donat St. Pierre, Acting Director of the Safeguards and Security Division, during a staff meeting on March 9, 2000 that the division was being reorganized and that Byrum was being moved from the Personnel Security Branch to the Security Oversight and Support Branch. Byrum further alleged that, when he asked St. Pierre why he was being reassigned and who made the decision, St. Pierre ultimately answered that the decision had been made by his boss, Dan Wilken, stating, "It's no secret to anyone present. You know the history of that bunch in Personnel Security; all of the disgruntlement. A decision was made to make a personnel change in an attempt to quell some of the disgruntlement." ALJX 73.

The parties exchanged pre-hearing reports and proposed exhibits on June 26, 2000. The Respondent's Pre-Hearing Report listed proposed DOE Exhibit 39 as "Overheads used at Security Reorganization Meeting, including Organizational chart." ALJX 89 at 7. On June 30, 2000, Counsel to the Complainants filed an objection to the authenticity of proposed DOE Exhibit 39 and a motion for default judgement, or in the alternative, a motion to amend each Complainant's complaint. Included in this filing was an affidavit from Byrum who stated that proposed DOE Exhibit 39 was not a true and correct copy of the overheads used at the March 9, 2000 staff meeting and that proposed DOE Exhibit 39 was particularly misleading in that it purported to show that his position remained in the Personnel Security Branch while the overhead actually used at the meeting showed him being reassigned to the Security Oversight and Support Branch. *Id*. Pointing out that proposed DOE Exhibit 39 clearly bears the date of April 6, 2000, the Respondent responded that the challenged document was mistakenly submitted due to a clerical error, and it submitted an affidavit from St. Pierre who stated that when counsel to the Respondent had requested that he provide copies of the overheads or transparencies used at the March 9, 2000 staff meeting, he had mistakenly forwarded the chart showing the organizational structure as it existed on April 6, 2000. ALJX 90. The Respondent also moved to substitute for proposed DOE Exhibit 39 the documents actually used at the March 9, 2000 staff meeting which were admitted as RX 39B.

St. Pierre testified at the hearing that he told Attorney Boatner, the Respondent's counsel, that he could not provide the overheads he had used at the March 9, 2000 meeting but would provide

those reflecting the current organizational structure of the division. TR 1169-70, 1178, 1187, 1193-94. However, in a post-hearing declaration, Attorney Boatner states:

> Mr. St. Pierre could not have misunderstood my request on the morning of June 26, 2000. I was very clear and specific in my request that he send me copies of the overheads which he used during the March 9, 2000 meeting. I also find it difficult to understand why Mr. St. Pierre did not say anything about his no longer having a copy of the Overheads which he used during the March 9, 2000, meeting.

Declaration of Ivan A. Boatner (August 21, 2000). These contradictory accounts of the events leading up to the submission of proposed DOE Exhibit 39 belie any innocent explanation. After weighing St. Pierre's muddled and confusing testimony at the hearing against the candid and forthright representations made by Attorney Boatner at the hearing and in his post-hearing declaration, I find that St. Pierre's explanation is not credible. Nor am I persuaded that the absence of any malicious or fraudulent intent on the Respondent's part is demonstrated by the ease with which the Complainants were able to discover that proposed DOE Exhibit 39 is not what it was purported to be. While the circumstances are suggestive of a lack of guile on St. Pierre's part, I find on the basis of Attorney's Boatner's declaration that St. Pierre deliberately attempted to obfuscate the facts relating to the March 9, 2000 meeting and reorganization which is the subject of Byrum's amended complaint.

Next to be considered is the appropriate sanction for the Respondent's misconduct. The Complainants initially moved for a default judgement, a drastic penalty which I find unwarranted in this case, especially where no evidence was deliberately lost or destroyed. *See West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776, 779-80 (2nd Cir. 1999) (noting that dismissal is a "drastic" remedy which should only be employed in extreme circumstances, usually after consideration of alternative, less drastic sanctions). However, I find that it is appropriate in the circumstances of this case to draw an adverse inference of discriminatory animus on the part of St. Pierre. *See Webb v. Carolina Power & Light CO.*, USDOL/OALJ Reporter (HTML), ARB No. 96-176, OALJ No. 1993-ERA-42 (ARB August 26,1997) at 9-10 (finding discriminatory animus based on material alterations of a witness's statement and the witnesses contradictory statements regarding the complainant's performance). *See also Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (general rule is that bad faith destruction of a document relevant to proof of an issue gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction). Additionally, as discussed earlier, the Complainants were allowed to amend their complaints at the hearing to allege that the Respondent's conduct with respect to RX 39 constitutes spoliation of evidence and further retaliation against the Complainants for their protected activity.

2. Violation of the Sequestration Order

At the commencement of the hearing, a sequestration order was issued on the Complainants' unopposed motion. TR 33-36. Despite this order, St. Pierre testified that during the afternoon of the day before he was called to testify, he received two telephone calls from Ron Adams, the Chief

of the Personnel Security and Assurance Branch, shortly after Adams had concluded his testimony at the hearing where he had been called as a witness by the Complainants. TR 1236, 1239.[17] Though St. Pierre was reluctant and evasive in providing the details of his conversations with Adams, he did reveal that Adams had told him that the atmosphere of the hearing was heated and intense, TR 1237, 1239, that he had been questioned on whether Dan Wilken made a decision to make a move or not make a move (an apparent reference to the Byrum reassignment that was announced at the March 9, 2000 staff meeting), TR 1238, and "something about why Ken Warden was not selected in a personnel security lead position." TR 1239-40.

While it appears that the violation of the sequestration order may have been unwitting, at least on St. Pierre's part, TR 1237-37, the disturbing fact remains that Adams discussed his testimony on multiple substantive issues with St. Pierre before the latter testified. It is well established that violation of a sequestration order is subject to sanction including consideration of the violation in assessing the credibility of the witnesses involved. *Holder v. United States,* 150 U.S. 91, 92 (1893); *United States v. Cropp,* 127 F.3d 354, 363 (4th Cir.1997), *cert. denied,* 522 U.S. 1098 (1998). Here, however, the violation was committed by witnesses across party lines. That is, Adams, the initiator of the improper contact testified for the Complainants, while St. Pierre, the recipient of the contact, testified for the Respondent. Under these particular circumstances, and noting that an adverse inference has already been drawn from St. Pierre's attempted spoliation of evidence, I conclude that additional sanctions for violation of the sequestration order are not warranted.

D. The Merits

The Complainants allege that they engaged in protected activity when they filed their prior complaints in *ORO I* or, in Byrum's case, when he supported and assisted the other Complainants, and that they have been repeatedly subjected by the Respondent to acts of reprisal for their protected complaint activities in violation of the employee protection provisions of the CAA, CERCLA, SDWA and SWDA. The employee protection provisions of the CAA, CERCLA, SDWA and SWDA are implemented at 29 C.F.R. §24.2 which in pertinent part states,

> (a) No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.
>
> (b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

[17] St. Pierre also admitted to calling another of the Respondent's witnesses, Barry Krause, after Krause had testified and before St. Pierre took the witness stand, but he denied discussing Krause's testimony. TR 1236, 1238.

> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in §§ 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

Under the burdens of persuasion and production in whistleblower proceedings, the Complainants first must present a *prima facie* case which consists of a showing that: (1) they engaged in protected conduct; (2) the Respondent was aware of that conduct; and (3) the Respondent took some adverse action against them. *Carroll v. Bechtel Power Corp.*, USDOL/OALJ Reporter (HTML), OALJ No. 1991-ERA-46 (Sec'y February 15, 1995) at 6, *aff'd sub nom. Carroll v. U.S. Department of Labor,* 78 F.3d 352 (8th Cir. 1996). The Complainants also must present evidence sufficient to raise the inference that their protected activity was the likely reason for the adverse action. *Id*. The Respondent may rebut the Complainants' *prima facie* showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons, and the Complainants may counter the Respondent's evidence by proving that the proffered legitimate reason is a pretext. In any event, the Complainants bear the ultimate burden of proving by a preponderance of the evidence that they were retaliated against in violation of the law. *Id. See also Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 146-47 (2000)*; St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 518-19 (1993).

1. Protected Activity and the Respondent's Knowledge

It is undisputed that Johnson, Warden and McQuade all filed environmental whistleblower retaliation complaints in *ORO I*. Although Byrum did not file a complaint on his own behalf, there is no dispute that he assisted the other Complainants by providing factual information about instances of retaliation he had observed and that he was present when the Complainants took the deposition of former ORO Manager Joe LaGrone on October 30, 1995 pursuant to an order issued by Judge Barnett in *ORO I*. In its closing argument, the Respondent once again contends that the Complainants' *ORO I* activities are unprotected because their complaints were dismissed for lack of protected activity. DOE Closing Argument at 2-3. For the reasons set forth in my April 29, 1999 order, ALJX 19, I find this argument to be wholly devoid of merit.

The ARB and the Secretary of Labor have consistently held that the filing of a complaint with the Department of Labor is protected under the federal environmental whistleblower statutes, and they have never imposed a requirement that a complaint pass any threshold examination of its underlying merit in order to achieve protected status. *See Tyndall v. EPA*, USDOL/OALJ Reporter (HTML), OALJ Nos. 1993-CAA-6, 1995-CAA-5 (ARB June 14, 1996) at 5 (filing of a complaint under the provisions of the Clean Air Act (CAA) "clearly constituted protected activity"); *Bassett v. Niagara Mohawk Power Co.,* USDOL/OALJ Reporter (HTML), OALJ No. 1986-ERA-2 (Sec'y

September 28, 1993) at 4 (filing complaint of retaliation because of safety and quality control activities under employee protection provision of the Energy Reorganization Act (ERA) of employer is a protected activity); *McCuistion v. TVA*, USDOL/OALJ Reporter (HTML), OALJ No. 1989-ERA-6 (Sec'y November 13, 1991) at 5 (filing a complaint or charge of employer retaliation because of safety and quality control activities is protected). The absence of any requirement that a prior environmental whistleblower complaint be meritorious in order to gain statutory protection is entirely consistent with the well-established principle under the National Labor Relations Act (NLRA) that affording *complete* protection to individuals who file complaints or provide information to the National Labor Relations Board is essential to prevent the agency's channels of information from being dried up by employer intimidation of prospective complainants and witnesses. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972), *rehearing denied*, 405 U.S. 1033 (1972) (upholding NLRB's interpretation that the NLRA protects employees who give statements to a NLRB investigator but do not file charges or testify at a formal hearing). The same unqualified protection has been granted to employees who file complaints with the Equal Employment Opportunity Commission pursuant to the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. *See Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir.1994) (" 'there is nothing in [the] wording [of the statute] requiring that the charges be valid, nor even an implied requirement that they be reasonable' ") (quoting 3 Arthur Larson & Lex K. Larson, EMPLOYMENT DISCRIMINATION §§ 87.12(b), at 17-95 (1994)); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (employee need not establish validity of his original complaint to establish a charge of employer retaliation for having made original charge)*; EEOC v. Kallir, Philips, Ross, Inc.*, 401 F.Supp. 66, 74 n. 6 (S.D.N.Y.1975), *aff'd*, 559 F.2d 1203 (2nd Cir. 1977), *cert. denied*, 434 U.S. 920 (1977). As the Eighth Circuit has observed,

> The merits of a charge made against an employer is irrelevant to its protected status. Access is protected; administrative and judicial mechanisms determine the truth, falsity, frivolousness or maliciousness of an EEOC charge or court complaint. Thus, employer retaliation even against those whose charges are unwarranted cannot be sanctioned.

Womack v. Munson, 619 F.2d 1292, 1298 (1980) (citations and footnotes omitted), *cert. denied*, 450 U.S. 979 (1981).

Based on this clear precedent, I again conclude that the Johnson, Warden and McQuade have established that they engaged in conduct protected by the CAA, CERCLA, SDWA and SWDA when they filed and prosecuted their complaints in *ORO I*. I further conclude that Byrum engaged in protected activity when he assisted the Complainants during the pre-hearing deposition of former ORO manager LaGrone as such conduct is clearly encompassed within the broad language of 29 C.F.R. §24.2(b)(3) which protects an employee who has "[a]ssisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes . . ." of an environmental whistleblower statute. I also conclude that the Respondent had knowledge of the Complainants' protected activities as it is undisputed that the Respondent defended the *ORO I* complaints and attended the LaGrone deposition. Accordingly, the Complainants have established the protected activity and employer knowledge elements of their case.

2. Adverse Employment Actions – Hostile Work Environment

In their complaints, the Complainants have alleged a series of actions and incidents as acts of retaliation based on their protected activity. The Complainants contend that these various actions and incidents, taken together, created a hostile work environment which violates the employee protection provisions of the environmental statutes. Complainants' Comprehensive Post-Hearing Brief at 96-100.

a. Background Evidence of Hostility Toward Complainants

There is no dispute between the parties that the last 15 years have been marked by significant controversy and conflict within the Personnel Security Branch at ORO. While the troubles within the Personnel Security Branch are a complicated matter, one significant source of conflict appears lie in managerial decisions in the late 1980s which reduced the personnel security analysts' authority over the granting of security clearances and emphasized approval of a greater number of clearances. During much of this period, the branch was under the direct or indirect supervision of Patricia Howse-Smith who was branch chief from August 1986 to 1989 and deputy director of the personnel division from 1989 to October 1998. TR 1558 (Howse-Smith).

In the late 1980s, after Howse-Smith became chief of the Personnel Security Branch, the Complainants began to disagree with her over whether security clearances should be granted to individuals who were working in sensitive positions for DOE or its contractors and who the Complainant's viewed as unsuitable under the applicable regulations. TR 213-18 (Warden); 582-87 (Johnson). The branch also attracted outside attention during this period when two Congressional investigations of the personnel security clearance operation were conducted, as well as a two-year investigation by the Respondent's Office of Inspector General. TR 234-35 (Warden); 594 (Johnson).

In 1988 or 1989, Warden, Byrum and McQuade raised their security clearance concerns to Howse-Smith's supervisor at the time, Bill Phelps. Phelps reportedly responded by warning them that they would suffer the same fate as an employee at another DOE field office who ended up in a broom closet counting paper clips after he raised similar security clearance concerns which resulted in some DOE managers losing their jobs. TR 221-22 (Warden).

The Complainants did not heed the warnings offered by Phelps, and they continued to question the granting of security clearances. In 1989, the rising friction apparently led to Howse-Smith announcing at a staff meeting during 1989 that Johnson, who was then a team leader in the branch with responsibility for reviewing the recommendations of other personnel security analysts, would no longer be allowed to discuss cases with the other analysts and that she was being moved across the hall to the inspections branch. TR 588-91 (Johnson). Around the same time, Warden, not satisfied with the responses he received from his superiors, placed an anonymous call to the DOE Inspector General's hotline and reported a situation where an employee had been allowed to remain on the job after testing positive for cocaine use. The following day, Howse-Smith convened a

meeting of the Personnel Security Branch and angrily stated that some "lowlife" had called the IG and complained about the way in which the clearance case was being handled. TR 224 (Warden).

During the Inspector General's investigation of the Personnel Security Branch, the Complainants met with the investigators and voiced their concerns over the granting of security clearances to unsuitable individuals and the Branch's failure to comply with applicable regulations. TR 234-35 (Warden); 594-95 (Johnson). While this investigation was ongoing, Howse-Smith stated at a staff meeting, "I don't know what the people who are complaining about me hope to gain. The only thing they are accomplishing is further antagonizing me." TR 236 (Warden). Warden perceived Howse-Smith's statement as a direct threat that she would retaliate against him for raising concerns about her. TR 237. Johnson also testified that Howse-Smith took the investigation personally, accusing the Complainants during staff meetings of being responsible for bringing in the investigators and stating that, "This is only going to further antagonize me. The people that are cooperating, the only thing you all are doing is further antagonizing me." TR 595-96.

In late 1989 or early 1990, shortly after the Personnel Security Branch was placed in the personnel division, Johnson and McQuade met with Dan Wilken, who was then chief of the personnel division, to discuss their concerns over the security clearance program. Johnson testified that Wilken became loud, belligerent and agitated, stating that their job was to grant security clearances. Wilken further stated that management had changed things and that the "change train" was coming and that there was a new way of doing business. TR 600-02 (Johnson). Johnson also testified that at another meeting in June 1990, Wilken even became physically aggressive, leaning across his desk and placing his face about eight inches from her's while screaming that it was not her job to determine who was or was not qualified to receive a clearance. Johnson further testified that when she and McQuade got up to leave Wilken's office, Wilken threw a pen in McQuade's direction, almost striking him in the face. TR 601-03. On another occasion, after Johnson had attempted to see former ORO manager Joe LaGrone, Wilken appeared in her office, stating that he'd been sent by LaGrone to speak to her. TR 592-93. Johnson and Wilken discussed the Complainants' concerns about the manner in which security clearances were being adjudicated and, when Wilken was about to leave, he remarked, " You could have been anything. You could have had anything you wanted. You just wouldn't listen." TR 593. Johnson asked, "Wouldn't listen to what?" and Wilken replied, "All we ask is that you do the job, follow the criteria." *Id.* Wilken was not questioned about these incidents.

In September 1990, a meeting with a facilitator was held at the La Quinta Inn in Knoxville in an apparent attempt to reduce the level of tension within the Personnel Security Branch. At this meeting, a question was raised at to the relationship between the personnel security analysts' jobs and the national security. According to the Complainants, Wilken stood up and stated that he did not want the burden of the national security on his shoulders and that the analysts should not either. He also said that the analysts' job was to grant clearances as this was a new day and management was taking a more "holistic" approach to granting security clearances. Wilken further stated that the "change train" was leaving and that the analysts did not want to be left at the station. He added that he was throwing them a "lifeline" and that they had better take it. TR 75-76 (Byrum); 605-06 (Johnson); 681-83 (Patterson). Johnson testified that Wilken's tone was belligerent and condescending and that he looked at the four complainants when he made these remarks, which she

and Byrum both interpreted as a direct threat to their jobs if they did not accede to management's wishes. TR 607 (Johnson); 76 (Byrum). Diane Patterson, another Personnel Security Branch employee similarly interpreted Wilken's comments as intimidating:

> [T]he whole purpose and the problems that had arisen in the branch were because Mr. McQuade, Mr Byrum, Mr. Warden and Mrs. Johnson had raised concerns about how clearances were being granted. And when they started doing that, they were viewed in a bad light by management, as well as their co-workers. So, when they got to this meeting, when we were supposed to be working out our problems to get along there in the branch, and they raised these concerns, Mr. Wilken became upset. I mean, it was very clear what he was stating. He was either saying, you get on board with the way we're going to do business or you're out of here.

TR 684. Wilken acknowledged using the term "change train" but did not recall saying "lifeline." TR 1511. He also testified that his normal demeanor at meetings is "fairly direct, fairly animated." TR 1479.

Later, in 1991, while the Inspector General's investigation was still pending, Howse-Smith met with Patterson to discuss the latter's annual performance appraisal. During this discussion, Howse-Smith told Patterson that she questioned Patterson's judgement for associating with the Complainants. TR 677-69. Patterson, who admitted to being on friendly terms with the Complainants and to having a romantic relationship with Byrum, TR 723-25, testified that she was upset and intimidated by Howse-Smith's comment because she had always tried to get along with everyone in the branch. TR 679. She also testified that Howse-Smith was argumentative and somewhat intimidating toward the Complainants and that she addressed them in a threatening tone during staff meetings. *Id*. Patterson stated that the Complainants were marginalized within the branch and treated as second-class citizens because they had raised concerns in the investigations which threatened Howse-Smith. TR 681. Patterson described the Complainants' work environment as extremely hostile, both before and after 1995. She further testified that this hostile environment worsened after the whistleblower retaliation complaints were filed in 1995, and she stated that she believed Howse-Smith and Wilken were out to get the Complainants. TR 714.

Ronald Adams, a former Secret Service agent who served with Vice President Bush and who became chief of the Personnel Security Branch in 1994, related similar observations about the relationship between the Complainants and the Respondent's managers. Adams testified that there was excessive animosity between the Complainants and Howse-Smith and that Howse-Smith even expressed hatred toward the Complainants for fighting her at every turn over the years. TR 751-52. Adams further testified that he was threatened by Wilken in 1994 while he was chief of the Personnel Security Branch. Adams stated that shortly after becoming branch chief, he denied a security clearance because he felt that he felt denial was required under the applicable regulations. Adams testified that when Wilken told him to approve the clearance, he responded that he derived his authority from Wilken and that Wilken could approve the clearance if he wished, but he would not. Shortly thereafter, Wilken informed Adams that Howse-Smith would be running the branch. Adams

responded that he no longer wanted to work in the branch as he felt ineffective due to impediments which Wilken had put in his way. Wilken said that he had never met anyone like Adams who wasn't a team player and who would not support him, and he then called Adams to his office where he stated that before Adams or Wilken left ORO, Wilken would "bury" him. Adams testified that he asked Wilken if he could call in a witness and have Wilken make this statement, and Wilken told him, "That's all. You're excused." TR 754-57. Wilken flatly denied ever making any such statement, and he characterized Adams's account as "absolutely, totally, one hundred percent wrong." TR 1511.

The task of assessing which witness is telling the truth is difficult because both Adams and Wilken appeared to be generally credible. However, I was particularly impressed by the candid and direct manner in which Adams responded to questions. This candor was evident on direct examination when he declined to align himself with either the Complainants or Howse-Smith in the dispute over the granting of security clearances:

> Q. As a general ideological matter, who did you come to side with in that dispute?
>
> A. That's sort of difficult. I found that on occasion the employees were correct in their findings. I also found on some occasions the branch chief had merit in some particular aspects that she differed with on the employees.

TR 747. Adams was equally candid on cross-examination when he testified that there was mutual animosity between the Complainants and Howse-Smith, characterized by arguments and shouting which, on occasion, he viewed as disrespectful toward Howse-Smith. TR 769-70. Adams also exhibited a disinclination to embellish or fabricate details concerning the Respondent's treatment of the Complainants even when such details were suggested by counsel. TR 752. Lastly, I note that Adams is clearly not an ally of the Complainants, having recommended at one point that McQuade be removed from his job. TR 770-71; RX 4-A-11. For these reasons, I credit Adams's testimony and find that Howse-Smith harbored significant hostility toward the Complainants for challenging her decisions on security clearances and that Wilken threatened Adams because Adams refused to issue a security clearance at Wilken's request.

b. Reassignment of Ken Warden

Warden, a 1973 graduate of the University of Tennessee, went to work for the Civil Service Commission in 1975 as an investigator doing background investigations for government agencies including DOE. TR 211-12. In September 1987, he went to work at ORO as a personnel security specialist in the Personnel Security Branch under the supervision of Patricia Howse-Smith. As a personnel security specialist, he analyzed background investigations for derogatory information, conducted security interviews and, in some cases, acted as a liaison to the chief counsel's office in administrative review hearings. TR 212-13.

In April 1995, McQuade, Johnson and Warden filed their first whistleblower retaliation complaints with the Department of Labor. McQuade was the first to file, and his complaint was the subject of a newspaper article which summarized his allegations regarding the improper granting of security clearances and named Howse-Smith as one of the offending DOE officials. TR 245-46 (Warden). The day after the newspaper article appeared, Howse-Smith called a meeting of the personnel division and stated that she wanted to thank all of the people in the division who had called her at home to offer their support and condolences. She then stated that "this [McQuade's] complaint is just another salvo in an ongoing battle." Although Warden interpreted Howse-Smith's remarks as an attempt to intimidate him and Byrum from filing complaints, he was not dissuaded and soon filed his own complaint. TR 247 (Warden).

At that time that the initial complaints were filed in April 1995, Howse-Smith had become the director of the personnel division, and Nettie Hudson had replaced her as the chief of the Personnel Security Branch. TR 247. Warden testified, without contradiction, that within a month of filing his initial whistleblower retaliation complaint, Hudson stated at a regular weekly staff meeting that his job duties were being reorganized so that he would no longer be doing personnel security interviews and, instead, would be assigned to coordinate the administrative review process. TR 247-48. Warden stated that the personnel security interviews were his most important responsibility, and he testified that his new duties consisted of clerical functions such as preparing correspondence, scheduling hearings and coordinating hearings which had previously been performed by personnel at lower grade levels. TR 248-49.

"Proximity in time between protected activity and an adverse action is solid evidence of causation." *White v. The Osage Tribal Council*, DOL/OALJ Reporter (HTML), ARB No. 96-137, OALJ No. 1995-SDW-1 at 4 (ARB August 8, 1997), citing *Bechtel Construction Company v. Secretary of Labor,* 50 F.3d 926, 933 (11th Cir. 1995). In the absence of any proffered evidence that there were legitimate, nondiscriminatory reasons for Warden's reassignment to clerical duties, I find it reasonable to draw an inference of retaliatory motivation from the close temporal proximity between Warden's protected complaint filing activity and the change in his duties. This inference is strengthened by Howse-Smith's contemporaneous statement that she viewed the complaints as another salvo in her continuing battle with the Complainants. While the reassignment of Warden's duties can not independently support a finding that the Respondent violated the employee protection provisions because no timely complaint was ever filed over this incident, it may be appropriately considered to "shed light on the true character of the matters" which are the subject of timely filed complaints. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994). *See also Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989) ("Evidence of past practices may illuminate . . . present patterns of behavior.").[18]

[18] Since the reassignment of Warden's personnel clearance duties involved a discrete personnel action, the lack of a timely complaint is not obviated under either a continuing violation or hostile work environment theory. *Varnadore v. Oak Ridge National Laboratories*, USDOL/OALJ Reporter (HTML), OALJ No. 1992-CAA-2 (Sec'y January 26, 1996) at 39-41.

c. The May 17, 1996 Interrogation of Commie Byrum

Byrum testified that when he attended the October 30, 1995 LaGrone deposition with the other Complainants and their then Attorney, Edward Slavin, Jr., the Respondent's attorneys objected to his presence, prompting Slavin to respond, "I want him here because he's my investigator." TR 84-85. Although he was concerned by this remark because he was not Attorney Slavin's investigator, Byrum stated that most of the individuals present laughed, and he did not believe that anyone took Attorney Slavin's remark seriously. TR 86-87.

Approximately seven months later, on May 17, 1996, Byrum was summoned to the office of his supervisor, Nettie Hudson, Chief of the Personnel Clearance and Assurance Branch, for an investigative interview by a personnel management specialist, Philip Barker. TR 87. At that time, the Personnel Clearance and Assurance Branch was under the supervision of Patricia Howse-Smith, Director of Personnel, who assigned Barker to conduct the investigation. TR 87-88; 1309. Smith During the course of Barker's interrogation which focused on Byrum's attendance at the October 30, 1995 LaGrone deposition and whether he was employed by Attorney Slavin, Byrum inquired about the ramifications of the investigation and was told that the allegations could result in his removal from federal employment. At this point, Byrum requested to have an attorney present, and Barker responded that he was not entitled to have an attorney but that he would be permitted to have a witness present. TR 88-90 (Byrum); 1330-31 (Barker); CX 5; CX 11. At Byrum's request, Ken Warden was brought in as a witness, and Barker attempted to proceed with the interview. However, Byrum refused to answer any further questions and advised Barker that he intended to file a suit over the incident. TR 1313-15 (Barker); CX 11.

Following the May 17, 1996 interview, Barker sent Byrum a copy of the prepared questions he had asked during the interview along with copies of documents he had been given by Smith when he had been assigned to conduct the interview. CX 5; TR 1315 (Barker). The documents which Barker provided to Byrum included a copy of an April 8, 1996 memorandum from Rufus Smith, Diversity Programs Manager (and husband of Patricia Howse-Smith), to Dan Wilken, the Assistant Manager for Administration and the management official responsible for the Personnel Division then headed by Howse-Smith. CX 3. This memorandum, which is entitled "TRANSFER OF EMPLOYEE CONCERN NO. 96-12 REGARDING POTENTIAL FRAUD", forwarded an anonymous employee concern which Smith stated that he had received upon his return to work on April 8, 1996. Smith wrote that the anonymous concern appeared to relate to Wilken's area of responsibility, and he requested that Wilken "handle the investigation/review of this concern in accordance with your established procedures." Smith also pointed out that the anonymous source had reported that the Inspector General had been contacted in December 1995 regarding the matter but had taken no action, and he requested that Wilken "coordin[ate] the follow-up activities with me so that I can update the Employee Concerns Tracking System as to the status of this matter." Attached to Smith's April 8, 1996 memorandum was an anonymous Employee Concerns Reporting Form which alleges "extortion/fraud/conflict of interest" and states,

> In Dec. 1995 I sent an anonymous letter to the IG at HQ about Commie Byrum. I overheard him saying he worked as an investigator for someone named Ed Slavin who is a lawyer suing DOE.
>
> I asked the IG to investigate. They haven't done anything.
>
> I think Byrum is xeroxing files and giving then to this Ed Slavin. How does DOE let this happen. It seems like a conflict of interest and a violation of the Federal Regulation for him to work for DOE and have another job working for a lawyer suing DOE.

CX 4. Byrum denied that he ever copied files for Attorney Slavin, worked for Attorney Slavin or ever made statements to Warden or anyone else that he had ever done so. TR 93. Warden also denied that Byrum had ever made such statements to him. TR 254.

In a series of e-mail messages to Patricia Howse-Smith in October 1996, Rufus Smith attempted to follow-up on the status of the Personnel Division's investigation into the anonymous Employee Concern about Byrum's alleged outside employment and providing information to Attorney Slavin. CX 7. On October 7, 1996, Smith wrote to Howse-Smith requesting a status report. Howse-Smith responded the following day that the Personnel Division had not taken any action because Byrum had refused to answer questions and because they had been advised not to take any action until the FBI completed its investigation. *Id.* Smith, in turn, wrote in an e-mail also dated October 8, 1996:

> Do we have a date that the FBI thinks they will be through with this matter?
>
> I might be overly paranoid but i think there is a connection to the alleged abuse of position in the Employee Concern and recent events with abuse of position in the incident at Y-12. The y both come out of Personnel Security.
>
> Management (above the Personnel Division and AMA) need to see the connection between these incidents and turn both over to the FBI and/or the U.S. Attorney. This is beginning to look like a pattern of behavior from certain elements of Personnel Security to abuse their positions and violate employee's [sic] rights to povacy [sic] and agency conduct standards.
>
> Why hasn't management requested external reviews/investigations into thesse [sic] matters. As I recall, allegations about other issues of misconduct were investigated by IG, GAO, and Congressional Committees. When will these employees be investigated by external entities?

Id. The record does not contain any response to this last message.

Barker also provided Byrum with copies of two documents from the Inspector General's office. The first is a memorandum for the record from a Sandra L. Schneider dated January 26, 1996 in which Schneider states that she spoke to Don Thress and Ivan Boatner of the ORO Office of Chief Counsel regarding Attorney Slavin's statement that Byrum was present at the October 30, 1995 deposition because he was Attorney Slavin's investigator. According to Schneider's memorandum, Thress and Boatner both confirmed that Attorney Slavin had made this statement which Byrum had neither confirmed nor denied. Schneider further wrote that she had asked Thress if any follow-up actions had been taken and that Thress responded that no action had been taken because of the on-going litigation. Thress reportedly stated that he was sensitive to possible adverse statements that Attorney Slavin could make regarding DOE's treatment of whistleblowers and that he would prefer to wait until the conclusion of the litigation before taking any action. CX 2 at 3. The second IG memorandum provided to Byrum is dated March 4, 1996 from Michael W. Conley, Deputy Inspector General, to the Director, Office of Nonproliferation and National Security. In this memorandum, Conley enclosed a copy of Schneider's January 26, 1996 memorandum for the record and added the following summary of the information received by the IG on November 22, 1995:

> Allegedly, Mr. Commie Byrum, a Personnel Security Specialist at the Oak Ridge Operations Office (ORO), has been providing Mr. Ed Slavin, an attorney, with information Mr. Byrum has obtained from security files he has access to in his federal position. Reportedly, Mr. Byrum has outside employment working as an investigator for Mr. Slavin. Reportedly, ORO officials are aware that Mr. Slavin [sic] has this outside employment that appears to conflict with his federal employment, but they have not taken any corrective action. Reportedly, Mr. Byrum has been heard telling Mr. Ken Warden, another Personnel Security Specialist, about his outside employment and the information he has provided to Mr. Slavin, as well as the fact that when Mr. Slavin was taking a "statement" from Mr. Joe LaGrone, former ORO manager, Mr. Slavin told Department officials that Mr. Byrum worked for him.

CX 2 at 1 (quotation marks in original). Conley's memorandum continued that the matter appeared to be "administratively resolvable", and he requested that the Director, Office of Nonproliferation and National Security provide a written response concerning what if anything that office had done or planned to do regarding the information provided. *Id*. There is no evidence in the record that this office took any action in response to Conley's memorandum.

Byrum was subsequently contacted by an FBI agent who asked him to come to the FBI's local office in Oak Ridge, Tennessee for an interview. Byrum agreed and was asked by the agent if he had ever provided information from DOE personnel security files to Attorney Slavin and whether he had ever worked for Attorney Slavin as an investigator or in any other capacity. Byrum answered both questions in the negative and heard nothing further regarding the matter. TR 94-95 (Byrum). No formal disciplinary action was ever taken against Byrum based on his attendance at the October 30, 1995 deposition and Attorney Slavin's comment that Byrum was his investigator.

Byrum also testified that he had a rather bizarre encounter with Rufus Smith on September 23, 1996.[19] On that date, Byrum and Patterson were on official travel at a DOE facility in Paducah, Kentucky. Byrum and Patterson both testified that while they were driving back to their office on the Oak Ridge Turnpike, their vehicle was cut-off by Smith who abruptly swerved into the lane in which they were traveling, nearly hitting their vehicle. Byrum and Patterson further testified that Smith then made a prolonged obscene gesture toward them. TR 102-105; 702-04. Upon his return to ORO, Byrum reported the incident to the Employee Assistance Program coordinator, Iris Housely, who prepared a memorandum setting forth Byrum's account. TR 1011-13 (Housely); CX 8. Smith denied that the incident ever occurred. TR 1413. I credit Byrum and Patterson and find that this incident occurred as they described, noting that both witnesses consistently related the material details of this incident though Patterson was sequestered during Byrum's testimony. In addition, their demeanor was sincere and direct, showing no capacity for the degree of mendacity that would be required to fabricate the incident and falsely report it Ms. Housely.

The Complainants produced evidence in the form of an affidavit taken from Patricia Howse-Smith during an internal investigation of an "EEO complaint" filed by McQuade that "[i]t is the policy of Oak Ridge Operations to allow legal representation at meetings where disciplinary actions are discussed if the employee requests legal representation." CX 41 at 5 (underlining in original). Thus, it appears that Barker's denial of Byrum's request to have an attorney present during the May 17, 1996 interview where possible disciplinary action was discussed constituted a deviation from the Respondent's normal policy and procedure. The Complainants also presented uncontradicted evidence that it was the Personnel Division's policy not to rely on derogatory information on employees provided by anonymous sources. TR 255 (Warden); 688 (Patterson); 753-754 (Adams).

An employer's failure to follow its normal procedures is strongly probative of deliberate retaliation. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). While Attorney Slavin's off-hand statement at the October 30, 1995 deposition may have provided the Respondent with some legitimate basis for further inquiry, the timing and unorthodox manner in which the investigation of Byrum was conducted militates against a conclusion that the Respondent was motivated solely by nondiscriminatory considerations. Indeed, the inference of retaliation is strengthened by the obscene gesture incident and by Smith's e-mail appeal that Byrum and others should be investigated because they initiated outside investigations themselves. As the Respondent has offered no credible evidence showing that Byrum was treated the no differently than any other similarly situated employee, I find that Byrum's protected activity in assisting the other Complainants and in attending the October 30, 1995 deposition was a contributing factor in the Respondent's initiation and prosecution of the investigation into his relationship with Attorney Slavin.

d. The May 8, 1996 Privacy Act Meeting

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[19] This incident addressed by the parties at the hearing but was not specifically alleged as a specific act of reprisal in any of the complaints filed.

In mid-April 1996, approximately one year after the first whistleblower retaliation complaints were filed, Warden and McQuade were contacted by a local television reporter, Jim Acosta, who was investigating the theft of a computer from the Oak Ridge National Laboratory which allegedly later came into the possession of a Texas drug ring. Acosta expanded his inquiry to include other possible example of theft of government property, and he interviewed Warden and McQuade on camera regarding their concerns about people with questionable backgrounds receiving top level security clearances and being given access to areas where sensitive government property and equipment could be located. TR 260-61 (Warden).

A few weeks after Acosta's interview with Warden and McQuade was broadcast, Wilken met with the employees of the Personnel Security Branch and stated that there had been "very close" to a violation of the Privacy Act. TR 107-12 (Byrum); 260 (Warden); 689 (Patterson). Warden and Byrum asked Wilken to be more specific, but he declined. However, he did state that it wrong for employees to entice anyone, including Congressional staff, to look at security files, and he warned that employees who violate the Privacy Act could be subject to disciplinary action up to and including termination, civil penalties and criminal prosecution. TR 261-62 (Warden). Warden testified that Wilken spent much of the time at the meeting looking in his direction, a gesture which he perceived as intimidating, and he stated that Wilken commented at one point during the meeting, "It wouldn't come as a surprise to anybody that we've got drug dealers in the plants and that government property is being stolen. All that does is make a good sound bite." TR 262. Warden described Wilken's demeanor at this meeting as angry and agitated, and he testified that he felt threatened that if he ever opened his mouth or went back on television, he would suffer some very severe consequences. TR 263.

Wilken testified that he attended the meeting in question because he had received the April 8, 1996 memorandum from Smith forwarding the anonymous concern for his review and action. He stated that because this anonymous concern indicated the potential for a violation of the Privacy Act, he "felt it was necessary to remind the – the Personnel Security Branch of how sacred the privacy of individuals – especially with the actions or the – the information that is available to them – how sacred that is and how it must be protected." TR 1478. Wilken testified that he had done this on a number of occasions in the past, and he mentioned one meeting several years earlier when he had the ORO chief counsel brief the Personnel Security Branch staff on their responsibilities under the Privacy Act. *Id.* Other than recalling that he was "irritated" with the division director for taking almost a month to set up the meeting and that he probably used his normal "fairly direct, fairly animated" demeanor, Wilken did not describe the meeting in any detail. TR 1479. After the meeting, Wilken distributed a memorandum dated May 8, 1996 to the personnel clearance and assurance staff confirming his discussion at the staff meeting. TR 1477, 1479-80. In this memorandum, Wilken stated,

> Information which is contained in Personnel Security files is the most personal information on individuals. Personnel Security staff have a responsibility to protect this information from <u>unauthorized</u> disclosure. This is a "trust" that we have and must be complied with. It is good to review this requirement periodically so that none of our staff put themselves in jeopardy of violating privacy rights. Amy Rothrock,

> ORO's Privacy Act Officer routinely provides briefings to DOE employees, contractor staff and others on the requirements of the Privacy Act. Because of the questions raised at our meeting, Amy was contacted and will brief the entire Personnel Division on May 16 at 9:00 a.m. in Room B10-B12 on the requirements of the Privacy Act as they pertain to the Division's activities. I would expect all of the Personnel Security Staff to receive this refresher.
>
> Recently we received an anonymous allegation that Personnel Security files may have been inappropriately provided to unauthorized users. While this allegation has not yet been validated and is being looked into, it is a sobering reminder that we must all be vigilant in our protection of privacy rights.

RX 14 at 3 (underlining and quotations in original). Wilken also wrote a memorandum on May 9, 1996 to Donald Pearman, the Respondent's Associate Deputy Secretary for Field Management, concerning the May 8 meeting. RX 14 at 1-2. In this memorandum, which appears to have been motivated by Wilken's receipt of a call from Attorney Slavin who accused Wilken of threatening whistleblowers at the meeting, Wilken stated that he decided that he needed to remind the personnel security staff of their obligations under the Privacy Act after he received the anonymous employee concern from Smith in April. He further wrote that the meeting was focused on the need to protect Privacy Act information, and he stated that he specifically did not tell employees that they could not talk to the media:

> At the meeting one individual declared that he wasn't going to give up his "constitutional rights"to talk to the media or anyone else in general terms about our Personnel Security program. I specifically told him that I wasn't talking about general statements but rather the divulging of specific information on individuals which is covered by the Privacy Act.

Id. at 2 (underlining and quotations in original).

It certainly can not be gainsaid that the Respondent has a legitimate business justification in keeping its employees informed of their responsibilities under the Privacy Act. Byrum himself willingly acknowledged this under cross-examination. TR 143-45. However, Wilken's explanation that the May 8, 1996 meeting was merely a routine, periodic training session on the Privacy Act is betrayed by the facts. First, the anonymous employee concern which allegedly prompted him to hold the meeting contained a discrete and narrow charge that Byrum was copying files for Attorney Slavin. There is simply no indication in either the anonymous concern or in Smith's April 8, 1996 memorandum of possible violations of the Privacy Act by any other employees which might warrant a meeting with the entire branch staff. Second, I find on the basis of the credible testimony of Warden, Byrum and Patterson that the meeting was not strictly limited to the Privacy Act in light of Wilken's thinly-veiled disparagement of the televised concerns of Warden and McQuade as providing nothing more than a "good sound bite." And, third, the descriptions of Wilken's tone as agitated and angry are incongruent with a routine training session and a strong indication of another agenda which

I find to be an attempt by Wilken to subject the Complainants to the threat of discipline and even criminal prosecution for making public disclosures of their security concerns. I also find it noteworthy that the May 8, 1996 memorandum which Wilken sent to the personnel security after the meeting makes no mention of the distinction Wilken purportedly drew between disclosures of general concerns regarding the Respondent's personnel security program and disclosures from individual personnel files which might run afoul of the Privacy Act. "[E]mployees have the right to be free from discriminatory action meant to deprive them of their statutory rights . . . [and] the behavior of employers to foist such restrictions on the employees . . . does constitute adverse action with respect to an employee's right to communicate with regulatory agencies. *Connecticut Light & Power Co. v. Secretary*, 85 F.3d 89, 95 n.5 (2nd Cir. 1996) (affirming the Secretary's holding that an employer's conduct in offering a settlement agreement with "gag" clause to an environmental whistleblower complainant constituted a discriminatory adverse employment action which violated the employee protection provisions of the ERA). In my judgement, the timing and tone of the May 8, 1996, combined with Wilken's references to the Complainants' post-complaint public disclosure of their personnel security concerns, amounted to intimidation, restraint and coercion of the Complainants which is prohibited by 29 C.F.R. §24.2(b).

e. The July 1996 "Center of Excellence" Meetings

In July 1996, Howse-Smith met with employees in the Safeguards and Security Division regarding DOE's "Center of Excellence Program" which was designed to consolidate important functions within a single field office. Under this concept, if a field office was designated as a "Center of Excellence" for a particular function such as personnel security, all personnel security clearance functions would removed from other DOE facilities and consolidated at the designated location. During her meetings in July 1996, which were attended by Complainants Byrum and Warden, Howse-Smith speculated that ORO would probably not receive Center of Excellence designation for personnel security and that personnel security employees at ORO would be forced to relocate or lose their jobs. Byrum, Warden and Patterson all testified that Howse-Smith explained that ORO would not receive Center of Excellence designation in personnel security because of the "history" and "longstanding problems in the branch." TR 111-15 (Byrum); 263-68 (Warden); 695-702 (Patterson). Warden testified that Howse-Smith's demeanor was "agitated" and that she was "kind of gloating" when she made these remarks." TR 265-66. At the time that these Center of Excellence meetings took place in July 1996, the initial complaints in *ORO I* had already been filed, and employees understood Howse-Smith's references to "longstanding problems" and "history" in the branch to mean the lawsuits filed and security concerns raised by the Complainants. TR 698-99 (Patterson). Patterson additionally testified that as employees were exiting the meeting where Howse-Smith had attributed ORO's dim prospects of attaining Center of Excellence status to the Personnel Security Branch's longstanding problems and history, employee Tom Townsend turned to Byrum and said, "See what you've done." TR 701. Warden and Patterson further testified that this meeting raised the level of hostility toward the Complainants within the branch; TR 267 (Warden); 701 (Patterson); and Townsend testified that it seemed to him that management only brought up the Center of Excellence program and the threat of job loss when employees raises security concerns or filed complaints. TR 804.

Howse-Smith did not address the Center of Excellence meetings in her testimony, and the Respondent offered no other evidence to refute this allegation. Accordingly, I find that Howse-Smith linked the possibility of involuntary transfer or job loss to "longstanding problems" and "history" within the Personnel Security Branch and that her remarks were quite reasonably understood by employees as placing the blame for such consequences on the Complainants for challenging personnel security practices and filing environmental whistleblower retaliation complaints. I further find that the Respondent, by singling out the Complainants as bearing the responsibility for their co-workers' threatened job loss, intimidated, restrained and coerced the Complainants in violation of 29 C.F.R. §24.2(b) in part because they engaged in protected complaint filing activity.

f. The October 1, 1996 "Suspension" and Reassignment of Warden

Warden and McQuade were interviewed a second time by television reporter Acosta in late September 1996 in the context of Acosta's continuing investigation which, at that time was examining an incident where an employee allegedly attempted to walk out of the Y-12 plant with a weapons part. TR 267-69 (Warden). The interview was broadcast on Monday, September 30, 1996. TR 269 (Warden). Warden testified that Acosta also asked if he knew anyone who might be able to confirm the weapons part incident, and he agreed to make a few phone calls. TR 271. Warden testified that he then called two contractor employees, Theresa Kirkland and O.J. Sheppard, on September 30 and asked them if they would be willing to talk to Acosta. Both declined, and Sheppard cited a pending FBI investigation into the incident as his reason for not talking to Acosta. TR 271-74.

After receiving the call from Warden, Sheppard prepared a memorandum concerning the contact. TR 1710 (Sheppard); CX 16. In this memorandum, Sheppard stated that Warden had told him that Acosta was looking for a confidential or anonymous source to verify that the part involved in the incident was classified, that it was a weapons part and that other people may have been involved. *Id.* at 1. Sheppard further reported that Warden had attempted to sway him by stating that the incident involved another DOE cover-up because DOE had refused to provide any information to the news media. Sheppard also stated that he told Warden that the incident had been referred to the FBI which would determine what information to release, and Warden asked him to identify the responsible FBI agent. *Id.* at 2. The copy of Sheppard's memorandum admitted into evidence indicates that it was sent to James Ware, Chief of the Safeguards and Security Division at 7:57 a.m. on October 1, 1996. Sheppard testified that he considered Warden to be representing DOE when he received Warden's September 30, 1996 telephone call, TR 1711, and he stated that he considered Warden's attempt to get him to release information to Acosta as "inappropriate and unethical." TR 1715. Warden agreed that Sheppard told him that the FBI was involved in the incident, but he denied asking Sheppard whether the stolen part was classified, whether it was a weapon part or whether there were other people involved. TR 331.

It appears that Ware had first learned of Warden's call to Sheppard on September 30, 1996 and that he called Howse-Smith to urge that Warden be removed from the personnel security and assurance branch because he had no business trying to get information that could hamper the FBI's investigation of the Y-12 theft incident. CX 15.

After lunch on October 1, 1996, Warden was summoned along with Nettie Hudson, who was then branch chief, to see Howse-Smith who was then Director of the Personnel Division. According to Warden, Howse-Smith asked Warden if he had called Sheppard about the Y-12 theft incident, and Warden confirmed that he had. TR 269-70. Howse-Smith then informed him that he was being accused of misuse of position, TR 269, and would be placed on administrative leave for the remainder of the week pending an internal investigation. TR 275. Warden was then escorted from the workplace. CX 17.

On October 4, 1996, while Warden was absent from the workplace on administrative leave, Howse-Smith prepared a memorandum in which she wrote that she had been informed by Melanie Kent, Acting Chief of the Personnel Management Analysis Branch, that Warden had called Iris Housely, the DOE nurse, to say that he had seen his psychologist who recommended that Warden was not in any mental shape to return to work before October 7, 1996. Howse-Smith further stated in this memorandum that Housely had also reported that Warden had made a statement that if he goes out, he is "going to take two or three people with him" as well as a past statement to the effect that he was so sick of what was going on that he'd like to take a gun anc come in and shoot the whole bunch. CX 18. Warden denied ever making either statement but added if he did, it was "stress talking." TR 338. He acknowledged that the allegation that he had made such statements was serious and that he would have expected the Respondent to question him, which they never did. TR 339. Housley was called as a witness and testified that Warden had made the statements attributed to him in the Howse-Smith memorandum, although she attributed the statements to stress and does not view Warden as a violent person. TR 1025-26. As Housley is an impartial witness whose testimony was more detailed on this point than Warden's, I credit her account and find that Warden did make the statements attributed to him in Howse-Smith's October 4, 1996 memorandum.

October 4, 1996, Ware and Industrial Security Specialist Carolyn W. Fuller interviewed Sheppard and Kirkland regarding their September 30, 1996 telephone conversations with Warden. Ware and Fuller set forth their investigative findings in a report dated October 7, 1996. CX 19. Wade testified that when he began his investigation, he was misinformed by Sheppard's supervisor, a Mr. Clements, that it was another employee, Ken Wingo, who had contacted Sheppard in an effort to get him to confirm details regarding Y-12 weapon theft. TR 1753. Regarding the seriousness of the issue, Ware provided the following testimony:

> A. It was significant for a couple of reasons. First, Mr. Clements expressed concern about this inquiry because we had informed the FBI of this alleged theft. The FBI had began an active investigation and therefore, we were concerned that a member of our federal staff would engage in an activity that displayed less than adequate judgment and providing prematurely information to the press on an active investigation.
>
> Q. And was this information that Mr. Wingo was alleged to have -- was this information classified?

A. It could have been. In fact, some aspects of it early on was. The reason that it was classified is because if, in fact, a nuclear weapons component that was classified intrinsically, and simply what that means is that the component would be classified because of its physical appearance or because of its dimensions or because of the material that it was constructed of, that would indicate that there is something intrinsically about this that if released to unauthorized persons would in some way endanger our national security in terms of nuclear proliferation. So, if, in fact, an individual had done this and been successful at removing one of those parts from a material access area and was one exit away from being able to walk away with that part, the manner in which he executed this would have then been classified because it would have revealed vulnerabilities in our security system.

TR 1753-54. Ware called Wingo in for an interview and confronted him with the allegation that he had contacted Sheppard. Ware testified that Wingo became very upset and denied any knowledge of the incident, so he went back to Clements and informed him that Wingo had denied the calling Sheppard. Clements said that he would check this out, and he later called Ware back and told him that Ken Warden, not Ken Wingo, had made the call. TR 1754-55 (Ware); CX 15. Aside from his initial meeting with Howse-Smith on October 1, 1996, Warden was not interviewed during the Respondent's investigation, and he did not have any opportunity to present his version of the incident. TR 277 (Warden). When it was pointed out to him on cross-examination that Wingo had been given an opportunity to answer the allegation in an interview while Warden was not, Ware conceded that this was a double standard and unfair to Warden. TR 1777-82.

When Warden reported to work on Monday, October 7, he was given a memorandum from Howse-Smith who stated, in pertinent part,

> This is to notify you that, pending the completion of the FBI investigation of the theft at the Y-12 Plant, you will be detailed to a position in the Directives Management Group effective October 7, 1996. The period of the initial detail will not exceed 120 days; however; this time period may be adjusted depending on the circumstances of the FBI investigation. This detail will not affect the status of your salary or any other benefits of your Federal employment and is not considered a disciplinary action.
>
> During the period of time that you are detailed to the Directives Management group, you will not: perform any duties of your present position of Personnel Security Specialist, GS-12; have access to the Personnel Security Branch location in the Federal Building or information, therein; or provide any counsel or advice relating to personnel security matters. Your current workload will be assigned to other specialists in the Division.

CX 20. Warden testified that when Howse-Smith delivered the October 7, 1996 "ADMINISTRATIVE LEAVE/DETAIL" memorandum to him, her tone and mannerisms were

"provocative" as though she was attempting to provoke a reaction which could be used against him. TR 280. He further testified that it was "obvious from her demeanor, body language and tone of voice that she was very much enjoying what she was doing." TR 281.

Warden testified that at the time he was detailed to Directives Management, the workload in personnel security was very high and that the staff had been reduced by retirement and attrition. However, when he reported to Directives Management, he was informed by his new team leader, Dawn Rosenstrom, that they had nothing for him to do. TR 281. Eventually, he was assigned functions such as photocopying, filing and taking notes at meetings and during conference calls which had formerly been performed by a student aide. TR 281-82. Although Warden was depressed and infuriated over this action being taken with his being deprived of any opportunity to address and resolve any concerns relating to the Sheppard incident, Rosenstrom wrote to Howse-Smith on November 1, 1996 that he had displayed a "can-do work attitude" and has been "an asset and welcomed addition to our office." CX 22. Rosenstrom repeated her highly favorable assessment of Warden's performance and "can-do" attitude in July 1997 when she provided input for Warden's annual performance appraisal. CX 28 at 2-3.

Before his assignment to Directives Management was made permanent, an issue arose concerning Warden's compliance with the Respondent's Technical Qualification Program (TQP) training which is required in order for an employee to remain qualified to work as a personnel security specialist. TR 286-87. On May 14, 1997, he received an e-mail message from Allen Clemons, the TQP manager, who reminded Personnel Security Branch employees of the TQP training requirements. Warden responded that he had received no information and no training since he had been detailed to Directives Management, and he stated that he did not know whether he needed the training. CX 24 at 2; TR 287-88. Clemons, in turn, advised Warden that he should talk to his manager, past or present, to determine whether he was still covered by the TQP training requirements. CX 24 at 1. Warden then initiated a series of e-mail correspondence with Howse-Smith in which he inquired about his TQP training status and expressed a desire to resolve any concerns that were preventing him from working in the Personnel Security Branch. Howse-Smith responded that she would not discuss the matter in e-mail, and she offered to meet with Warden. Warden replied that he had spoken to his attorney and could not understand why Howse-Smith was unwilling to respond to his questions in writing. Howse-Smith responded that Warden's attorney was not an employee of the Personnel Division and that questions about assignments and training are routinely handled through sit-down discussions between the employee and supervisor. She further stated that she saw no need to alter this process and concluded, "The choice is yours." CX 25 at 1; TR 292-94 (Warden). This impasse over the means of communication was not resolved, and Warden never received any training. TR 293 (Warden).

Warden's detail to Directives Management was originally set at 120 days, but it was twice extended by Howse-Smith. TR 278 (Warden); 1652-53 (Howse-Smith); CX 28 at 4. On these occasions when his detail was extended, Warden asked Howse-Smith how the FBI investigation was going, and she responded that she did not know, leading Warden to conclude that the Sheppard incident reassignment was "nothing but a ruse to get me out of personnel clearance and to get me out

of an environment where I could voice concerns about the way the program was being managed." TR 278. In July 1997, Howse-Smith informed Warden that she was making his reassignment to Directives Management permanent, TR 283 (Warden), and in August 1997, Warden was officially reassigned to Directives Management as a Management Analyst, GS-343-12. TR 284, 297; CX 28 at 4; CX 29. Howse-Smith provided the following rationale for Warden's permanent reassignment:

> The decision was made because there was still an ongoing concern about whether or not Mr. Warden would protect information he had access to based on the previous experience. We had a need for someone, because we had lost an employee in that group. We had a need for someone to support that activity. Mr. Warden had the ability to do it and had been going a good job.

TR at 1568. Howse-Smith also testified that Warden has not lost any pay or benefits as a result of his reassignment to Directives Management, and she asserted that the reassignment was not a "formal" disciplinary action. TR 1568-69.

Warden testified that he has remained in Directives Management since October 1997; TR 283; and his current team leader, Wayne Albaugh, confirmed that his duties in Directives Management are primarily clerical and administrative in nature. TR 951-52. Albaugh also testified that he had a discussion with Howse-Smith concerning Warden and the workload in Directives Management, and Howse-Smith stated, referring to Warden, "he can just run the copying machine." TR 950.

Warden protested the permanent reassignment and asked Howse-Smith to provide him with the authority for taking the action and his appeal rights. TR 298 (Warden). On September 23, 1997, Warden received the following note from Howse-Smith:

> Ken,
>
> I apologize for taking this long to get back to you on your request, however, the task of preparing for a RIF at the Direction of the Secretary of Energy had taken priority over everything else. Again, I apologize for the delay. Your question as I interpreted it was what gave me as the supervisor the authority to reassign you to the Directives management Group and what were your appeal rights.
>
> 5 USC 7106 gives management the authority to among other things "assign" employees and "assign work". As this is a management right the action itself cannot be appealed.

CX 27; TR 298-99 (Warden).[20] Warden was familiar with the "RIF" (reduction-in-force) mentioned in Howse-Smith's memorandum because he had received a memorandum dated July 30, 1997 to all ORO employees from ORO Manager James C. Hall concerning retirements and "buyouts" in light of the possibility that a staffing reduction would be necessitated by an appropriations bill then under consideration in the Congress. TR 295-96 (Warden); CX 21. Warden testified that while no positions in personnel security were targeted in the RIF, his new position in Directives Management was one of four positions in that organization which were slated for reduction, and he was fourth from the bottom in seniority. Ultimately, no RIF took place as Congress appropriated sufficient funds to support ORO's staffing. TR 296-97.

Subsequent to his permanent reassignment to Directives Management, Warden has continued his efforts to return to his old job in the Personnel Security Branch. Ron Adams, the current branch chief, testified that he is in the process of hiring for the branch and has tried to get Warden back, but he has encountered some resistence from St. Pierre and Wilken who admonished him to think long and hard before bringing Warden back. TR 761-66. Later in the hearing, Wilken testified he would allow Warden back into personnel security; TR 1496; but St. Pierre testified that he was under the impression that Warden should not be brought back to personnel security because he was a troublemaker. TR 1272-77. St. Pierre also made it clear that Warden's troublemaker reputation is related to his protected complaint filing activity:

> Q. How recently did Mr. Wilken and Ms. Smith give you the impression that Ken Warden was a troublemaker?
>
> A. Well, I had known that Mr. Warden was a part of this ongoing lawsuit well before coming back to Oak Ridge.

TR 1262. St. Pierre further testified that Wilken gave him the impression that all of the Complainants were "bad news" and that there have been "ongoing problems with these folks, the lawsuit . . . ." TR 1268-69.

There is ample objective evidence in the record that the Respondent's investigation into Warden's telephone call to Sheppard was supported by legitimate business considerations. The attempted theft of a nuclear weapons part unquestionably was a highly sensitive matter, and the Respondent can hardly be faulted for taking all reasonable measures to insure that the investigation into the incident was not compromised. That the investigation itself was not simply a pretext to retaliate against Warden and get him out of personnel security is clear from the fact that it was triggered by Sheppard who revealed himself to be no ally of Ware. TR 1729-34 (accusing Ware of

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[20] The section of the United States Code cited in Howse-Smith's response is the "Management Rights" clause of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 *et seq*.

interfering in an investigation into suspected drug use and drug dealing in the Respondent's facilities).

That said, the Respondent's treatment of Warden is troubling for several reasons. First and foremost, the corrective action employed, removing Warden from his job in personnel security, appears to have no rational relationship to the Respondent's stated concerns with his conduct in attempting to persuade Sheppard to talk to the press about the Y-12 theft incident. That is, the Respondent was concerned, as Ware explained it, because Warden displayed poor judgment by prematurely providing information to the press on an active investigation and because of the potential for improper disclosure of classified information concerning the stolen component and the manner in which the theft was carried out. Significantly, the incident did not involve Warden allegedly disclosing any information that he obtained from personnel security files or in his official capacity as a personnel security analyst, but rather an attempt to persuade a Sheppard, a contractor employee, to disclose information to which Sheppard had access. Since there is no evidence that Warden could not have made his allegedly improper contact with Sheppard from Directives Management as readily as he did from his job in the Personnel Security Branch, I find that the Respondent has not shown that its concerns over improper disclosure of classified information or compromise of the FBI's investigation constituted a legitimate, nondiscriminatory reason for either detailing Warden to Directives Management in October 1996 or permanently reassigning him there in July 1997.

The Respondent also contends that Warden was assigned to work in Directive Management based on legitimate, nondiscriminatory workload considerations, and it argues that the reassignment can not be viewed as an adverse action because Warden is thriving in Directives Management and because Warden admitted that he was doing well in that area and that the work environment is much better in Directives Management than it was for him in the Personnel Security Branch. Respondent's Closing Argument at 33-34. This argument also does not withstand scrutiny. While Warden may not have suffered a reduction in pay or benefits as a result of the reassignment, his uncontradicted testimony establishes that his job in Directives Management consists primarily of clerical functions and is less desirable and less prestigious than the position he held in the Personnel Security Branch. Based on this testimony, I find that the reassignment was a demotion. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). Moreover, the weight of the credible evidence reveals that Howse-Smith's asserted justification, that Warden was needed in Directives Management, is pretextual. Warden testified that his team leader in Directives Management did not know what to do with him and that he essentially had to find his own work to do. In addition, the fact that Warden's position in Directives Management was targeted for a possible RIF while no jobs in the Personnel Security Branch were affected, seriously undermines the claim that Warden was needed in Directives Management. Instead, when this fact is considered in light of the evidence showing that (1) Howse-Smith previously retaliated against Warden by removing his security clearance responsibilities because he filed his initial complaint, (2)Warden was reassigned to Directives Management with no more than a cursory opportunity to defend his actions and (3) that management officials have cautioned against returning Warden to the Personnel Security Branch because of his history as a "troublemaker", an inference is created that Warden's protected complaint filing activity played a part in the Respondent's decisions. As the Respondent has not produced credible evidence to rebut this

presumption, I conclude that Complainants have established that the Respondent discriminated against Warden by reassigning him to essentially clerical duties in Directive Management in retaliation for his protected activity in filing environmental whistleblower retaliation complaints.

g. Reprimand of Commie Byrum

On June 14, 1999, Byrum and Team Leader Nettie Hudson became engaged in discussion concerning placement of a recommendation on a case review and analysis sheet. It is undisputed that their discussion evolved into an argument over the proper procedure, and Byrum and Hudson took their disagreement to Barry Krause, the Associate Director of the Safeguards and Security Division. Two weeks later, on June 14, 1999, Byrum was summoned to the office of James Ware, the Director of the Safeguards and Security Division, where he was presented with a Notice of Verbal Reprimand for insubordination and threatening behavior and to warn him that "future such actions on your part may result in a more severe disciplinary action, including suspension or possibly removal." CX 12. The memorandum gave the following reasons for the reprimand:

> You became angry on February 3, 1999, when the Team Lead requested a file for further review. You became angry and began yelling at her which was overheard by others in the Team area. You stood over your Team Lead breathing hard and fast, almost snorting in a threatening manner. When she told you that you could leave, you stood in the doorway glaring at her and continued your breathing patter before telling her that you had been told she did not have authority to override an analyst recommendation. You further inferred that you had been told that any authority she though she had would be short lived. When questioned by her, you refused to identify the source of that information. You were warned about this behavior by the Associate Director.
>
> On June 14, 1999 at approximately 11 a.m., you became angry and began yelling at your Team Lead when she left you a note on a case file indicating that you needed to add your recommendation to the case review and analysis sheet. When you were told that case files were not to be taken out of the Team area for further action and review unless she was informed or approved such actions, you became angry and began shaking your finger at her and yelling that she was not your supervisor and could not tell you what to do. You also were yelling that she could not tell you what you could or could not do. This outburst on your part was overheard by others in the Team area. You and your Team Lead immediately came to discuss the problem with the Associate Division Director. During this discussion you again became loud. During this discussion you denied shaking your finger at your Team Lead. You were becoming so irate that she told the Associate Division Director that she refused to continue the discussion with you.

CX 12. Byrum testified that he told Ware that the reprimand was not accurate, and he tried to explain why it was not true, but Ware interrupted and asked, "Do you expect me to believe that

Nettie Hudson would come to me with a false accusation?" TR 119. According to Byrum, Ware then stated, "There's more here than meets the eye. There are things going on behind the scenes that we're not discussing here." TR 120. Byrum testified that he had no opportunity to tell his side of the story until he received the reprimand from Ware. TR 119. He specifically denied that he had been warned by Associate Division Director Krause regarding his alleged behavior on February 3, 1999; TR 119; and Krause confirmed that he had never verbally reprimanded or warned Byrum prior to June 14, 1999. TR 920-21. Byrum also denied shaking his hand or finger or yelling at Hudson during the June 14, 1999 incident:

> Well, first of all, I did not shake my hand or my finger at her. I did not yell at her. And again, my voice probably did not become louder than what I'm speaking right now. It's indicated that during our discussion with the associate division director that she refused to continue the discussion. What brought that about was that she said that the reason she wanted a discussion with the division director or associate director was the fact that I had shaken her [sic] finger at her. I told her that I had not shaken my finger at her. And this was in the presence of Mr. Krause, and she said, "Are you calling me a liar?" And I said, "Well, no, I'm not calling you a liar, but one of us is mistaken." And she said, "Well, you're a liar." And I said, "No Nettie, I'm not a liar, but one of us is definitely mistaken." She said, "Well you're questioning my integrity. I refuse to discuss this any further with you." So, Barry asked me to leave at that point. Mr. Krause.

TR 122-23. Byrum also testified that when Krause spoke to him after the incident, he denied pointing his finger at Hudson, and Krause told him "that could be construed as a threat, you know, if you didn't okay, but don't ever do it again if you did." TR 178-79.

Hudson, on the other hand, testified that Ware's June 28, 1999 Notice of Verbal Reprimand accurately described the February 3, 1999 and June 14, 1999 incidents; TR 898; and another witness who overheard the June 14, 1999 argument testified that Byrum's voice was raised. TR 838-39 (Leonard-Spruill). Krause testified that Hudson and Byrum were obviously irritated with each other, but were not yelling, when he met with them on June 14, 1999. He stated that he asked Byrum to leave when Hudson indicated that she wished to continue discussing the matter with him alone. TR 924-25. Krause further testified that he wanted to support his supervisor, so he twice asked Hudson if she wanted to pursue a reprimand, but Hudson responded that she did not wish have Byrum reprimanded and only wanted to straighten out the manner in which records were going to be handled. TR 922-25. Krause told Hudson that he would speak to Byrum after lunch, and he stated that he met with Byrum and informed him that he could not shout at his supervisor even if he was upset and disagreed with a decision. TR 925-26. Krause testified that he was unable to find Hudson after he had spoken to Byrum, but he informed Ware that he had spoken to Byrum about the incident. According to Krause, Ware agreed with the manner in which he had handled the incident and agreed with his assessment that no further action was warranted. Krause then left Hudson a note to this effect and considered the matter resolved. TR 926-28.

Hudson agreed with Krause that she had not asked that Byrum be reprimanded, but she testified that she told Krause she was not satisfied with the manner in which he had handled the matter because he had spoken to Byrum privately when she wanted a meeting to talk about the incident. TR 893-94. Hudson testified that she then went to Ware because she was dissatisfied with Krause's resolution and wanted to be sure that Ware heard her version of what had happened. TR 899-900, 904-5. Hudson also testified that she felt that the reprimand and, in particular the reference to possible suspension or removal, was "excessive" and "overkill". TR 908, 910-11.

Ware testified that the statement in the reprimand that Byrum had previously been warned by Krause about his conduct on February 3, 1999 was inaccurate and resulted from a misunderstanding. TR 1669-70. Ware stated that he had no reason to disbelieve Krause's testimony that Hudson had twice indicated that she did not wish to pursue a reprimand, and he admitted that Byrum had no opportunity to comment on the June 14, 1999 incident prior to the issuance of the Notice of Verbal Reprimand even though basic fairness requires that employees have the right to get their story heard. TR 1783-84, 1786-88.

Hudson credibly testified that she was disturbed by Byrum's behavior during the June 14, 1999 incident. Therefore, I find that there is a factual basis for the allegations contained in Ware's Notice of Verbal Reprimand. However, Ware's failure to provide Byrum with an opportunity to respond to Hudson's version of events, an omission which is clearly contrary to the Respondent's policies and fundamental fairness, when combined with Hudson's testimony that she did not want Byrum disciplined, the inaccurate statement that Byrum had been previously warned about similar behavior and Ware's statements about there being "more going on than meets the eye" and factors "behind the scenes", raises an inference of disparate treatment based in part on Byrum's protected complaint filing activity. On these facts, and noting particularly that Ware did not deny or explain his statement that there were additional, unstated reasons for the disciplinary action, I find that the Notice of Verbal Reprimand was issued in part because Byrum engaged in protected complaint filing activity.

h. The March 9, 2000 Reassignment of Commie Byrum

On March 9, 2000, Donat St. Pierre, the Acting Director of the Safeguards and Security Division held a meeting with the Division's staff to announce a reorganization. It is undisputed that St. Pierre stated at this meeting that Byrum would be moved from the Personnel Security Branch of the Safeguards and Security Division to the Security Oversight and Support Branch where he would no longer perform personnel security functions, including security clearance interviews and analysis, but would be performing physical security functions, including inspections of facilities. The reorganization and Bryum's reassignment were depicted on organizational charts which St. Pierre distributed and displayed on an overhead projector. Byrum inquired as to why he was being moved, and St. Pierre responded that it was because of his experience in personnel security and because of Byrum's background in federal law enforcement. In response to Byrum's question about who had made the decision to move him, St Pierre stated that the decision had been made by Dan Wilken, the Assistant Manager for Administration. St. Pierre then added, while gesturing in Byrum's direction,

that the decision had been made in an effort "to quell some of the disgruntlement." TR 125-31 (Byrum); 706-712 (Patterson); 757-59 (Adams); 785-87, 790-91 (Townsend); 815-818 (Leonard-Spruill); 843-49 (Belland); 882-87 (Hudson). Several of the witnesses testified that St. Pierre also referred to "history" and Byrum being part that disgruntled "bunch" or 'group" in "personnel security" when explaining the rationale behind the decision to reassign Byrum. TR 711-12 (Patterson); 790 (Townsend); 818 (Leonard-Spruill); 884-85 (Hudson).

Earlier in 2000, Selicia Leonard- Spruill had requested to be moved out of the Personnel Security Branch, but her request was denied by St. Pierre for the asserted reason that the personnel security workload was simply too heavy to move anyone at that time. TR 813 (Leonard-Spruill);1120 (St. Pierre). Multiple witnesses testified that the workload in the Personnel Security Branch in March 2000 was very heavy and that they understood St. Pierre's explanation of the reorganization to mean that Byrum, the most senior employee then in the Personnel Security Branch, was being moved to punish him for speaking up and filing complaints. TR 712-13 (Patterson); 766 (Adams), 787, 794-95 (Townsend); 814-18 (Leonard-Spruill), 886 (Hudson). Indeed, Townsend testified that on the day Byrum was transferred, the personnel security workload was one-hundred cases behind due to a lack of personnel. TR 794-95. St. Pierre's testimony was vague and at times confusing regarding the March 9, 2000 meeting, as well as other pertinent events, but he did acknowledge giving conflicting rationales for Byrum's reassignment, and he stated that it was clear that the attendees at the meeting "misunderstood" what he was saying. TR 1230-31.

On Monday, March 13, 2000, Byrum was reassigned to the Inspections Branch pursuant to St. Pierre's announcement at the March 9, 2000 meeting. TR 1804 (Byrum). Although he had been reassigned to the Inspections Branch and reported to the acting branch chief, Wayne Yodel, Byrum testified that he spent the day in his office in the Personnel Security Branch where he worked on finishing a few personnel security cases. TR 1810-11. Byrum was out of work the next two days for evaluation and treatment of an acid reflux condition. TR 1805 (Byrum). He testified that when he returned to work on Thursday, March 16, he was summoned to St. Pierre's office where he was informed by St. Pierre that he had been returned to the Personnel Security Branch because he had "sicced" his lawyer on St. Pierre and, in an apparent reference to the environmental whistleblower retaliation complaint filed shortly after the March 9, 2000 meeting, because the layer had "filed papers." TR 1809. St. Pierre did not deny making these statements. TR 1168.

Howse-Smith offered a substantially different explanation for the rescission of Byrum's reassignment to the Inspections Branch. She testified that she learned of Byrum's reassignment and the reasons given by St. Pierre at the March 9, 2000 meeting for the first time when she received a call after the meeting from Hudson and another employee. TR 1570-71. She stated that her reaction upon hearing what had transpired was "shock" because "[you can make moves to change an organization to give people a different look where you have additional needs, but in terms of moving someone because you feel they are disgruntled, that's prohibited." TR 1572. Howse-Smith further testified that after she discussed the situation with Wilken, who was also unaware of what St. Pierre had done, and,

> We called St. Pierre over to our building and confronted him and asked him if he, in fact, had announced the reorganization the way he said he -- what we had heard. He confirmed that he did, and we talked to him about the concerns we had voiced previous to his announcement and told him he just couldn't do that . . . I told Mr. St. Pierre that he could not do that, that was a prohibited action to move someone for that reason.

TR 1574. Howse-Smith stated that she told St. Pierre "that because Mr. Byrum had – was a whistleblower, that any move such as this would be viewed as retaliation and that we just could not do that." TR 1575. Howse-Smith further testified that the Byrum's reassignment also made no sense from a workload perspective because "they have been so far behind in the personnel security group" and would not be able to "backfill" to compensate for Byrum's loss. *Id*.

The Respondent attempted to establish that there were legitimate, nondiscriminatory reasons for Byrum's reassignment to the Inspections Branch. For example, it was suggested that the reassignment was related to an accusation by a contractor's employee that Byrum had threatened her a few weeks before March 9, 2000, and it tried to show that Byrum's experience and training with the Bureau of Alcohol, Tobacco and Firearms, the U.S. Marshal's Service and the Border Patrol made him particularly suited to Inspections Branch work. However, Byrum responded that the threat accusation was investigated by the Respondent and found to be untrue, and that his background as an AT agent was not relevant to the work in the Inspections Branch. TR 175, 183-84. The Respondent offered no other evidence to support these claimed reasons, and it now bases its defense on the fact that the reassignment was quickly cancelled. In this regard, the Respondent contends that the reassignment did not constitute actionable retaliation because it caused Byrum no more than "temporary unhappiness" which did not adversely affect his terms, conditions or privileges of employment and, therefore, did not rise to the level of actionable whistleblower retaliation under *Griffith v. Wackenhut Corp*., USDOL/OALJ Reporter (HTML), ARB No. 98-067, OALJ No. 1997-ERA-52 (ARB February 29, 2000). In my view, the Respondent's reliance on *Griffith* is misplaced for two significant reasons. First, the ARB noted in *Griffith* that the employer had acted quickly, effectively and completely on its own initiative to correct an unjustified personnel action and to ensure that such actions would not occur in the future:

> The officials recognized their error on their own; no grievance had to be filed, no prodding from the NRC or the Labor Department was necessary. Griffith's lost pay was restored immediately (if, indeed, the order to cut her pay ever even took effect), and the letter of reprimand was expunged from her personnel file immediately (if the letter was ever even written or placed in her file). And finally, the investigating officials developed recommendations for curing the underlying training and supervision deficiencies. These recommendations were implemented at Salem and Hope Creek, and Griffith herself testified that less than six months later conditions at the facility were much improved.

Id. at 11-12. Here, however, the Respondent may have acted quickly, but it is abundantly clear from St. Pierre's statement to Byrum that he was being sent back to the Personnel Security branch because he'd "sicked" his lawyer on St. Pierre and because the lawyer had filed papers that the reassignment was rescinded not because of any enlightenment on the Respondent's part, but because Byrum had filed a complaint alleging that the reassignment amounted to environmental whistleblower retaliation. Moreover, there is no evidence in this record that the Respondent has successfully implemented any measures to cure underlying training or supervisory deficiencies. Second, and perhaps more importantly, *Griffith* involved an isolated action against a single employee where the instant case involves multiple actions against multiple employees who allege that the totality of the Respondent's conduct toward them created a hostile and abusive work environment. Under these circumstances, I conclude that the facts of this case are markedly different from the situation in *Griffith* where the ARB relied on policy considerations in characterizing the employer's rescinded disciplinary actions as a "brief stumble" which had been effectively remedied:

> The [employee protection] provision is meant to encourage covered employees to speak out about safety hazards without fear of reprisals and to encourage covered employers to respond constructively and without reprisals. Viewed in their entirety, Wackenhut's actions certainly sent the right message to employees and resulted in safety improvements.

Id. at 12. The only message sent to the employees who attended the March 9, 2000 meeting is that Byrum was being transferred out of the Personnel Security Branch because of his reputation as a disgruntled employee and his association with the other complainants and their protected activities. Accordingly, I conclude Byrum's March 9, 2000 reassignment to the Inspection Branch constituted retaliation in part based on his protected complaint filing activity. Moreover, the Respondent's unlawful conduct in this instance is aggravated, as discussed above, by the attempted spoliation of relevant evidence.

h. The February 21, 1990 "Disgruntled Employees" Memorandum

The Complainants' April 12, 1997 complaint alleges further retaliation based on their receipt of information in April 1997 which indicated that the Respondent's headquarters has been "blacklisting" them because of their protected activities since 1990. ALJX 3. The basis of this allegation is a memorandum dated February 21, 1990 from a John Rabb to a John C. Tuck which the Complainants or their former counsel discovered in April 1997. In this memorandum, which refers to a visit to Oak Ridge by staff of the Oversight and Investigations Subcommittee of House Energy and Commerce Committee (the "Dingle Committee") during February 1990, contains the following statement in a paragraph dealing with personnel security: "There a number of disgruntled employees in the Personnel Security Branch, and two in particular have contacted the OSE office and the IG to complain that a number of their clearance recommendations have been overturned by their superiors." CX 1 at 1. The Complainants presented no evidence, aside from the memorandum itself, to support this allegation, and they have not addressed it in their post-hearing brief. In view of the fact that the reference to disgruntled employees predates any protected complaint filing activity by several years, I find that the February 21, 1990 memorandum is not probative of whether the Respondent has subjected the Complainants to a hostile and abusive work environment because they filed their whistleblower retaliation complaints in *ORO I*.

j. Retaliation Against Virginia Johnson.

Virginia Johnson voluntarily left ORO in July 1991, years before the first whistleblower retaliation complaint was filed, to take a job in the Respondent's headquarters where she is currently employed as a senior level personnel security expert. TR 610 (Johnson). In addition, only one of the 15 complaints currently before me, the April 10, 1997 complaint involving the February 21, 1990 "disgruntled employees" memorandum, specifically alleges any acts of post-complaint retaliation against Johnson. Nevertheless, Johnson did give testimony which I find relevant to the issue of whether the Complainants have been subjected to a hostile and abusive work environment.

Johnson testified that after her transfer to the Respondent's headquarters, she was assigned to coordinate a national-level investigation on behalf of the Secretary of Energy into human radiation experiments during the 1940s and 1950s. She also worked with the a Presidential advisory committee in compiling a report on this issue, and she received as award from the Secretary of Energy. TR 611-12. She has received two promotions since her transfer to Headquarters, and her performance has been consistently rated as outstanding or highly successful. TR 642, 644.

Despite her success in Headquarters, Johnson testified that she would very much like to return to Oak Ridge since it is her home. TR 612-13. She stated that she had recently applied for a job as the Director of the Safeguards and Security Division at Oak Ridge but was not interviewed for the position even though she had made the best qualified list. TR 613. Wilken testified that he was the selecting official for this position and that he and the other two members of the interview panel did not interview Ms. Johnson because she was not on the list of the top ten applicants which had been prepared by a rating and ranking panel composed of DOE employees at the GS-15 level. TR 1499.

Assuming without deciding that Johnson has presented a *prima facie* case of unlawful discrimination with respect to her application for the position of Director in the Safeguards and Security Division, I find that the Respondent has met its burden of producing evidence that it had a legitimate, nondiscriminatory reason for not interviewing or selecting Johnson, *i.e.*, Johnson's failure to the make the list of the top ten applicants. Because the Respondent produced evidence that its actions were motivated by a legitimate, nondiscriminatory reason, the burden shifted back to Johnson to prove by a preponderance of the evidence that the Respondent's proffered reason is incredible and constituted pretext for discrimination. *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos. 98-111, 98-128, OALJ No. 1997-ERA-53 (ARB April 30, 2001) at 13. I find that Johnson has failed to carry this burden as the Complainants offered no evidence to show that the Respondent's stated reason for not interviewing Johnson is pretextual. That is, the Complainants have not alleged, much less proved, that Johnson was on the list of the top ten applicants or that inclusion of the top ten list was an irrelevant consideration in determining whether to interview applicants. Accordingly, I conclude that the evidence does not establish that Respondent's failure to interview or select Johnson for the Director's position constitutes either prohibited retaliation for Johnson's complaint filing activity or evidence of a hostile and abusive work environment.

Johnson also testified that one of her responsibilities as a senior personnel security expert is to participate as a member of inspection teams which visit DOE facilities throughout the country to assess compliance with the DOE's security regulations. In this capacity, she has been a member of

inspection teams for every DOE facility with two exceptions, ORO and the Hanford facility in Washington. TR. 624. Johnson testified that in 1999 she was assigned by her director, Barbara Stone, and associate director, John Hyndman, to a team that was scheduled to inspect ORO in September 1999. She stated that she knew about their "sensitivity"and did not expect to inspect the personnel security operation at ORO, so she asked what she would inspecting and was told that she would be inspecting program protection management. TR 627. Johnson testified that she then traveled to Oak Ridge and attended an "in-briefing" where the members of the inspection team and their points of contact at the facility are introduced to each other. During this meeting, Hyndman introduced all of the team members, who stood up and raised their hands as their names were called, except Johnson. TR 628-30 (Johnson). Johnson testified that she was "devastated" by being overlooked, so she went to Hyndman after the meeting and asked why she was not introduced as she thought that she was going to be working on program protection management. TR 630. Hyndman told her that she would not be inspecting program protection management and instead would helping the administrative team which provides clerical support for the inspection team. TR 631. Johnson testified that Hyndman explained to her that "because of the perception, because of the lawsuit, you can't – you know, it wouldn't look good for you to inspect Oak Ridge Operations." TR 626. Johnson testified this was the first time that she had ever been assigned to the administrative team during an inspection; TR 631, 635; and she testified that her work during the ORO inspection mainly involved clerical functions such as photocopying, traveling to and from the Federal Express office and watching trucks entering a portal. TR 632. Johnson further testified that at one point during the ORO inspection, the team needed extra help with personnel security, and another inspector was flown in from Idaho, rather than placing Johnson back on the inspection team. TR 635-36. Johnson stated that she was humiliated by being left off the team and that "it broke my heart to not be able to inspect." TR 634. Johnson testified that she subsequently was told by Glen Podonsky, the head of the Headquarters security evaluation office, that she would never be assigned to work on an inspection of ORO as long as she remains involved in whistleblower litigation:

> A. Well, we were in Rocky Flats not long ago, and my boss and I were talking and he said, "Yes, that lawsuit" –
>
> JUDGE SUTTON: Who is your boss?
>
> THE WITNESS: Glen Podonsky. He's our big boss. And we were talking and he said, "That lawsuit hinders you from doing a lot of things that you want to do." He said, "You know, as long as you have that lawsuit, as long as Oak Ridge, you know, that's going on, the perception is that, you know, you're malcontents, you're disgruntled employees, you're troublemakers." He said, "All those things, they carry forward." He said, "Even though we know you're not like that, we can't take a chance and send you down there."

TR 637-38. Johnson testified that this conversation took place in March 2000, and she said that Podonsky has "teased" her on other occasions about her DOL complaint, saying that she'll never be able to get back to oak Ridge as long as she has "that lawsuit". TR 658-59. Neither Podonsky or Hyndman testified at the hearing.

The Respondent asserts that these incidents are unrelated to Johnson's protected activities because over four years had passed from the time when she filed her environmental whistleblower retaliation complaint. Respondent's Closing Argument at 6-7. It is true that an extended period of time between a complainant's protected activity and an alleged adverse action militates against a finding of a causal connection between the two, absent evidence to the contrary. *Bonanno v. Stone & Webster Engineering Corp.*, USDOL/OALJ Reporter (HTML), OALJ Nos. 95-ERA-54 and 96-ERA-7 (ARB December 12, 1996) (passage of three years, with evidence of a lack of animus on the part of the Respondents after the protected activity sufficient to convince the ARB that there was no causal connection between the protected activity and alleged adverse actions). Here, however, there is evidence to the contrary. Johnson's credible and uncontradicted testimony regarding the statements made by Hyndman and Podonsky bridges the temporal gap and provides the requisite link between Johnson's protected complaint filing activity and the Respondent's decision to remove her from any inspection duties during the ORO security inspection. The Respondent additionally cites Johnson's testimony that it is critical that inspection reports be completely objective and defensible as evidence that it had a legitimate, nondiscriminatory reason for removing Johnson from the September 1999 inspection team because of Johnson's bias against ORO. Respondent's Closing Argument at 8-9. In the absence of any other credible evidence to support this defense, and in light of the statements made by Hyndman and Podonsky, I find that a preponderance of the evidence establishes that the Respondent's proffered reasons are not believable. Accordingly, I conclude that the Complainants have proved by a preponderance of the evidence that Johnson was removed from inspection responsibilities during the ORO inspection because of her protected complaint filing activities.

k. Alleged Discrimination Against Dennis McQuade

There remain for consideration several allegations of retaliation against McQuade which are not barred by the doctrine of issue preclusion. While one might reasonably view these allegations as moot because they predate McQuade's removal and are, therefore, beyond the reach of any meaningful remedy in this proceeding, I have determined that they should be considered in view of the important public interests underlying the employee protection provisions. *See Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993) (quoting the Supreme Court's decision in *NLRB v. Scrivener*, 405 U.S. 117, 122-23 (1972) in holding that broad protection of employee complaints under the environmental whistleblower protection statutes is "necessary to prevent . . . channels of information from being dried up by employer intimidation of prospective complainants and witnesses.").

In a complaint filed on August 24, 1995, McQuade alleges that the Respondent retaliated against him by sending him a threatening letter on August 17, 1995. ALJX 1A. The letter in question was issued in response to an August 14, 1995 telephone call which McQuade made to Wilken. McQuade testified that he made this call because he was upset over hearing that Wilken had received a $20,000.00 award at a time when he was suffering serious emotional and physical problems which he attributed to the years of harassment and retaliation he had suffered at the hands of the Respondent's managers because he had raised concerns over security clearances. TR 428-36. McQuade testified that Wilken returned his call and the following conversation occurred:

> He called me back and said, "Dennis, this is Dan. How are you doing?" I said, "I'm not doing to good and I blame it on you, you son-of-a-bitch." And I told him, I said, "I don't care what it takes or how long, until the die [sic] if it takes, I'm going to track you down and I'm going to kick your ass." And I told him that. And I heard a click and I said, "Are you recording this, Dan?" And he said, "Yes, I am." And he hung up.

TR 436, 520. Wilken's recollection of the call is substantially the same:

> But I did return his call and when I - when he answered the phone, I said, "Dennis, this is Dan Wilken. I'm returning your call. How are you?" And his response was, "How do I think you are" -- "How do you think I am, you silly son-of-a-bitch," and then launched into a tirade that went on for several minutes. Basically the key elements of which, quoting, were "I'm going to fuck you up. I'll get you. I'll find you. I'll track you down and I'll get you and I will kick your ass." And I had said nothing at that time and then approximately a couple of minutes into the conversation he stopped and he said, "I suppose you're recording this." And my response was, "I am." That was it. And then he launched off into a continuing tirade which says, "I don't care whether you're recording it or not," and finally I just hung up the phone.

TR 1470-71. After Wilken hung up, McQuade testified that he realized that he had "stepped out of bounds", so he called the ORO Manager, James Hall, and left a message that "You can tell Dan Wilken he has nothing to fear from me. It was really a reaction to the medication." TR 437. He also testified that he went to Hall's office and said, "I'm not going to apologize to Wilken because he never apologized to me for the way he treated me and I consider some of that treatment pretty abusive." *Id*. Hall then sent McQuade a letter dated August 17, 1995 which in pertinent part states,

> Neither this office nor Mr. Wilken wishes to pursue legal or administrative disciplinary action against you since you and your psychiatrist have indicated that you have a psychological problem which you are attempting to deal with through medication. Our main concern is for your health as well as the welfare and safety of all ORO

> employees, and we therefore encourage you to seek help from your psychiatrist and offer you continued assistance through our Employee Assistance Program. You have also discussed with Mr. William Phelps, Director, Safeguards and Security, your desire to pursue a medical retirement based on your emotional/psychological problems.
>
> As I am sure you understand, although we have not taken action to suspend your clearance at this time, we will be restricting your access until we are sure that your problem has been treated effectively. You will require an escort for areas that require a clearance and we will make appropriate accommodations for your work station when you return to work.
>
> Once again, We are very concerned for your health and will support your efforts to be treated and pursue a medical retirement. However, we will not tolerate any future threats stalking, or intimidation of any employees of the Oak Ridge Operations Office. I am asking that the appropriate employees contact you to assist you with your application for medical retirement. Meanwhile, I approve any continued leave you require (annual, sick, or unpaid) while waiting for OPM to act on your application assuming that it is accomplished within a reasonable time.

RX 40. McQuade alleges that this letter is threatening and amounts to continuing harassment and retaliation for his protected activities. In evaluating this claim, it must be kept in mind that the employee protection provisions are not "intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999), citing *Kahn v. Secretary of Labor*, 64 F.3d 271, 279 (7th Cir.1995) (rejecting a complainant's "attempt to hide behind his protected activity as a means to evade termination for non-discriminatory reasons"). While McQuade clearly engaged in protected activity when he filed his whistleblower retaliation complaint, his threat to physically harm Wilken is plainly another matter. Since the Respondent's August 17, 1995 letter addresses only McQuade's threats and makes no reference whatsoever to anything even remotely related to McQuade's protected activities, I find that the evidence does not establish that the Respondent unlawfully retaliated against McQuade by issuing the August 17, 1995 letter.

McQuade further alleges in a complaint filed on October 13, 1995 that the Respondent retaliated against him by sending a psychiatric report to Attorney Slavin on about September 15, 1995 through a hotel facsimile machine with no reasonable expectation of privacy. ALJX 1B. The Complainants presented no evidence in support of this allegation, and they have not addressed it in their closing argument. Accordingly, I conclude that there is insufficient evidence to establish that this action constitutes either actionable retaliation or evidence of a hostile and abusive work environment.

In a complaint filed on November 13, 1995, McQuade alleges that the Respondent retaliated against him by issuing a reprimand on November 8, 1995. ALJX 1C. The Complainants presented no evidence in support of this allegation, and they have not addressed it in their closing argument. The record shows that the reprimand was issued in response to a handwritten request dated September 29, 1995 which McQuade submitted to the Respondent's Freedom of Information Act (FOIA) Officer, seeking disclosure of information relating to the $20,000.00 award reportedly received by Wilken. ALJX 1C, Attachment 2. In his request, McQuade described Wilken as representing "everything antithetical to what a public servant should be" and questioned how Wilken "could possibly be awarded additional taxpayer money as a reward for 'screwing' the American taxpayer." *Id*. (internal quotations in original). In a notice of reprimand dated November 8, 1995 and issued by Rodney R. Nelson, the Respondent's Assistant Manager for Defense Programs, reprimanded McQuade for making "highly irresponsible and potentially defamatory written statements against . . . Daniel Wilken" and warned that "any future such delinquencies, of this or any sort, will lead to more severe disciplinary action up to and including removal." ALJX 1C, Attachment 1. Nelson also wrote that while McQuade was within his rights to inquire about Wilken's award, his statements regarding Wilken's character were "insulting, demeaning, and without basis" conveying "an attitude of disrespect and contempt toward Mr. Wilken, with a clear objective of tarnishing his reputation as an employee of the Federal Government." *Id*. By letter dated December 22, 1995, James C. Hall, the ORO Manager, advised McQuade that the reprimand had been canceled and removed from his official personnel file "in the spirit of the holiday season and the time for new beginnings that a New Year always provides." RX 30. Hall's letter concluded by urging McQuade to contemplate the appropriateness of his behavior and to continue his medical treatment on a regular basis. The record thus shows that the reprimand had a factual basis which appears unrelated to any of McQuade's protected complaint filing activities. Under these circumstances, and noting the Complainants' failure to prosecute this allegation, I find that there is insufficient evidence to establish that this action constitutes either actionable retaliation or evidence of a hostile and abusive work environment.

Although not alleged in any of their 15 complaints, the Complainants have raised additional instances of alleged retaliation against McQuade: (1) compromising McQuade's anonymity on a survey which he completed in early 1996; (2) restricting McQuade's access to the ORO Federal Building in April 1996 after McQuade and Warden appeared on local television to discuss the whistleblower retaliation complaints and personnel security clearance concerns; and tampering with McQuade's telephone in April 1996 after McQuade and Warden appeared on local television. Complainants' Comprehensive Post-Hearing Brief at 61-67.

McQuade admitted to completing the anonymous survey and making a number of inflammatory remarks which he now regrets. TR 441-44. In his responses to the survey, McQuade made the following suggestions and comments:

Do away with all of this 'diversity' non-sense - it is simply a buzzword for preferential treatment of blacks.

* * * * *

To fulfill AA and EEO quotas, substandard, unqualified blacks are hired in place of more qualified whites. Many cannot spell 'quality' or 'initiatives', yet they are given OS performance appraisals + cash awards, e.g., Patricia Howse-Smith, Nettie Hudson, Selicia Leonard.

* * * * *

Get rid of entire upper Mgmt. Team - put em in jail.

* * * * *

The only performance measures are skin color + Political Correctness.

* * * * *

There is no avenue of recourse shy of a taxpayer rebellion.

* * * * *

Take the management staff, with a few exceptions, and conduct public executions.

* * * * *

Shoot the scumbags! [This is followed by arrows pointing to the names of Wilken and LaGrone].

CX 34 (internal quotations in original). McQuade stated that he wrote these comments on the survey because they represented his assessment of ORO, which he described as a dysfunctional organization, and he stated that he completed the survey questionnaire under an assurance of complete and total

anonymity. TR 443. Despite these assurances, McQuade's survey responses came to the attention of Ware who recognized McQuade's handwriting and wrote the following in an April 16, 1996 to Stephanie Grimes, who had interviewed McQuade in connection with his security clearance investigation in December 1995:

> Reference my letter to Edward McCallum dated November 21, 1995, in which I requested adjudication of security case for Dennis J. McQuade.
>
> Enclosed please find a copy of a survey which was sent in anonymously but bears a striking resemblance to Mr. McQuade's handwriting. This information may be significant as you evaluate information relative to his suitability to hold an access to authorization. If you have any question [sic] please feel free to [call] me at (423) 576-0720.

TR 441-42; CX 34. On April 17, 1996, one day after Ware forwarded McQuade's survey responses to Grimes and one day after McQuade and Warden made their appearance on local television, McQuade's access to the ORO Federal Building was restricted by requiring Ware personally escort him at all times. TR 459 (McQuade); CX 36-37. At McQuade's request, Robert Dempsey, the Assistant Manager for Defense Programs, confirmed the access restrictions in a memorandum dated April 22, 1996, stating that the restrictions were "intended to insure that a chance confrontation between yourself and individuals with whom you have previously been in conflict will not occur." CX 38. At the hearing, Dempsey testified that the access restrictions were implemented to minimize the chance Mr. McQuade might have encounters with Wilken or Rufus Smith. TR 1696. McQuade testified that although he had confrontations with Smith about five years earlier and with Wilken when he made his ill-advised telephone call on September 14, 1995, he had subsequent contact with both individuals without incident. TR 450-55. On cross-examination, the Complainants' counsel asked Dempsey to assume that there had been no subsequent conflicts between McQuade, Smith and Wilken, and Dempsey candidly admitted that, based on those assumptions, it would be "wacky" and a "little odd" to restrict McQuade's access to prevent any future conflicts." TR 1690-94. Based on this testimony elicited from Dempsey and the absence of any reference in Dempsey's April 22, 1996 memorandum to McQuade's survey responses, the Complainant's argue that the Respondent's stated reason for restricting McQuade's access, to prevent future conflicts, must be false and that the real reason must be McQuade's appearance on the local television broadcast. Complainants' Comprehensive Post-Hearing Brief at 61-66. This argument ignores a critical fact, namely, Ware's discovery of McQuade's survey responses on April 16, 1996 which contain specific violent statements directed at Smith and Wilken. Indeed, in today's climate of heightened employer concern over incidents of workplace violence, the Respondent had little choice but to take some action to protect its employees. And, contrary to the Complainants' arguments in their reply brief, I find it significant that the Respondent did not alter Warden's access to the Federal Building even though he appeared with McQuade on the same television broadcast. After consideration of all of the relevant facts, and noting the employee protection provisions do not shield employees from the consequences of their own misconduct, I find that the Respondent has shown that it has a legitimate, nondiscriminatory reason for restricting McQuade's Federal Building access and that the Complainants have not carried

their burden of proving by a preponderance of the evidence that the Respondent's reason is a pretext for unlawful discrimination.

Regarding the alleged tampering with his telephone, McQuade testified that he placed a call from his office telephone on April 17, 1996 to Frank Juan, another ORO employee, and Juan invited him to watch a tape that Juan had made of McQuade's televison appearance. Shortly thereafter, McQuade was contacted by Diane Patterson who told him that she was upset because she had found the entire McQuade-Juan telephone conversation recorded on her voice mail. TR 445-47 (McQuade; 686-87 (Patterson). McQuade testified that he then went to Ware's office where he reported the incident to Ware and Dempsey. Ware reportedly looked at him as though he had "three heads" and asked if he could listen to the recorded telephone call. McQuade further testified that Ware never came to listen, but two Safeguards and Security employees, Carolyn Fuller and Pat Belland, did come along with "two guys from Y-12 . . . experts in what they call technical security countermeasures . . . they sweep for bugs and probably plant some too, if the truth be known." TR 444-45. McQuade stated that the Y-12 security countermeasure experts checked his telephone and ran "a little sweep" but could not find anything out of the ordinary. TR 445.

Belland, who testified for the Complainants regarding the March 9, 2000 Safeguards and Security Division meeting, was also questioned regarding his investigation into the McQuade-Juan telephone conversation being recorded on Patterson's voice mail. Belland testified that he had previously investigated McQuade's concerns that someone was eavesdropping on his telephone conversations but found no evidence. TR 864-65. Regarding the recording of the McQuade-Juan conversation, Belland testified that his investigation revealed an unusual situation with a newly-installed PBX switch which he was able to duplicate on his own telephone:

> And the situation was this – and I was able to duplicate it on my own phone after I got the report. And that is, if you were to pick up – if you were to call person A and you let it ring and you knew it was getting to the third or fourth ring, which would get it into voice mail, and you said, "Oh well, instead of calling person A, I'll call person B", and you hit the thing and just let it go, it was almost like conferencing. Like if you hit the flash button instead of the hang-up button, and the PBX read that as a flash hook rather than a hang-up and then would conference you into the – the next person you called would then be – you'd be on a three-way conference between the voice mail you just left, you intended to leave, bu didn't, and the next person you called. So any conversation that you would have with person B would then be recorded on the voice mail of the person A that you though you had disconnected from. And this was a fault that was later corrected in the software of the PBX program

TR 866. The Complainants offered no rebuttal evidence, and I find on the basis of Belland's entirely credible testimony that it is more likely than not that McQuade himself, with the assistance of the PBX switching software, inadvertently recorded his telephone conversation with Juan, rather than being the victim of any surreptitious and discriminatory attempt to monitor his telephone calls.

E. Conclusion

Based on the foregoing findings, I conclude that, with the exception of the allegations involving Complainant McQuade, the Complainants have established by a preponderance of the evidence that the Respondent has violated the employee protection provisions of the CAA, SDWA, SWDA and CERCLA, as implemented at 29 C.F.R, §24.2, by discriminatorily subjecting the Complainants to a hostile work environment because they engaged in protected activity in filing and prosecuting their environmental whistleblower retaliation complaints. The elements of proof in a hostile work environment case are:

(1) the plaintiff suffered discrimination because of his or her protected activity;

(2) the discrimination was pervasive and regular;

(3) the discrimination detrimentally affected the plaintiff;

(4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and

(5) the existence of *respondeat superior* liability.

Varnadore v. Oak Ridge National Laboratories, USDOL/OALJ Reporter (HTML), OALJ Nos. 1992-CAA-2, 1992-CAA-5 and 1993-CAA-1 (Sec'y January 26, 1996) at 49. The Complainants satisfy the first element as I have found that they suffered repeated discrimination because of their protected activities. With regard to the second element, I note that the discrimination against the Complainants has persisted over a five-year period since they filed their first complaints in 1995. This discrimination has consisted of more than insults and ridicule; it has involved multiple, specific acts of retaliation against Byrum, Warden and Johnson which materially affected their working conditions which were clearly sufficient to "detract from employees' work performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993). The Respondent argues that Johnson's allegations of a hostile work environment must fail because she has not worked at ORO since 1991 and because the evidence shows that she has been promoted and rewarded in her Headquarters position while experiencing no more than a few isolated, "teasing" comments about her protected activity from one management official. Respondent's Closing Argument at 10-12. The record does indeed suggest that Johnson's work environment in DOE Headquarters is far from hostile. However, the record also convincingly shows that the environment at ORO has been consistently hostile toward Johnson because of her whistleblower retaliation complaints. Since the evidence establishes that Johnson in her current position still has contact with ORO and suffers discrimination affecting her terms and conditions of employment when her duties involve interaction with ORO, and since Podonsky's statements indicate that this discriminatory treatment will continue as long as Johnson is involved in protected activity, I conclude that Johnson, like Byrum and Warden, has established that she has suffered pervasive and regular discrimination at ORO. With regard to the third and fourth elements, Byrum, Warden and Johnson all convincingly testified that they have been detrimentally affected by the Respondent's discriminatory treatment. They have been deprived of opportunities to do work they enjoyed; they have felt threatened by the hostility of the Respondent's managers toward their protected activity; and they have effectively been converted into workplace pariahs. None of the Complainants is unduly sensitive, and the testimony from several of their peers that they reacted to the Respondent's

expressions of hostility in the same manner as the Complainants is powerful evidence that any reasonable person of the same protected class would be detrimentally affected by the Respondent's discrimination. Accordingly, I conclude the Respondent's discrimination detrimentally affected the Complainants and would have detrimentally affected a reasonable person of the same protected class in that position. Finally, I conclude that the element of *respondeat superior* liability has been satisfied as the Respondent has not disputed that the individuals responsible for the discriminatory acts were employed as supervisors and agents.

F. The Remedy

The Complainants seek compensatory damages, full litigation expenses and affirmative relief in the form of a cease and desist order as well as exemplary damages for the Respondent's unethical conduct. Complainants' Post-Hearing Brief at 86-96. Under the whistleblower provisions of the environmental acts, a successful complainant is entitled to affirmative action to abate the violation, including reinstatement to his former position, back pay, costs and attorney fees. *Jones v. EG & G Defense Materials, Inc.*, USDOL/OALJ Reporter (HTML) ARB. No. 97-129, OALJ No. 1995-CAA-3 (ARB September 29, 1998) at 18; 42 U.S.C. §7622(b)(2)(B) (CAA). In addition, compensatory damages may be awarded under the CAA, 42 U.S.C. §§7622(b)(2)(B), and exemplary damages, where appropriate, are expressly authorized under the SDWA. 42 U.S.C. §300j-9(i)(2)(B)(ii).

1. Abatement of the Violations

To remedy the Respondent's violations, I will order that the Respondent cease and desist from discriminating against any of the Complainants with regard to any and all terms, conditions and privileges of employment because they engaged in activities protected under 29 C.F.R. §24.2. In addition, I will order that Kenneth Warden's detail and reassignment to the Directives Management Branch be rescinded and that he be reinstated to his former position in the Personnel Security and Assurance Branch. I will also order the Respondent to rescind the June 28, 1999 Notice of Verbal Reprimand issued to Commie Byrum and expunge from its records any and all memoranda or other references to this action. *McMahan v. California Water Quality Control Board, San Diego Region*, USDOL/OALJ Reporter (HTML), OALJ No. 1990-WPC-1 (Sec'y July 16, 1993) at 4. I will also order the Respondent to post copies of the final order in this matter in the cafeteria at the ORO Federal Building and at least one other conspicuous place accessible to employees in the ORO Personnel Security and Assurance Branch for a period of 90 days. *Smith v. Esicorp, Inc.*, USDOL/OALJ Reporter, ARB No. 97-065, OALJ No. 1993-ERA-16 (ARB August 27, 1998) at 7.

2. Compensatory Damages

The Complainants seek compensatory damages for emotional and physical harm which they attribute to the Respondent's unlawful discrimination. The ARB has provided the following guidance regarding awards of compensatory damages for the type of harm allegedly suffered by the Complainants:

> Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. *Busche v. Burkee*, 649 F.2d 509, 519

> n.12 (7th Cir. 1981), *cert. denied, Burkee v. Busche,* 454 U.S. 897 (1981)*; Thomas v. Arizona Public Service Co.,* Case No. 89-ERA-19, Sec. Final Dec. and Ord., Sept. 17, 1993, slip op. at 27-28. All that is required is that the complainant "show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978).
>
> Nor is testimony from family members always necessary for entitlement to compensatory damages. In another case involving a complainant's loss of a job in his long standing profession, the Board ordered substantial compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts. *Creekmore, supra*, slip op. at 24-25; *see also Crow v. Noble Roman's, Inc.*, Case No. 95-CAA-08, Sec. Final Dec. and Ord., slip op. at 4 (complainant's testimony sufficient to establish entitlement to compensatory damages).

Jones v. EG & G Defense Materials, Inc., USDOL/OALJ Reporter (HTML) ARB. No. 97-129, OALJ No. 1995-CAA-3 (September 29, 1998) at 22-23. *See also Hobby V. Georgia Power Co.*, USDOL/OALJ Reporter (HTML) ARB. No. 98-166, OALJ No. 1990-ERA-30 (ARB February 9, 2001) at 30-31

Complainant Byrum testified that he suffers from acid reflux disease which required a surgical procedure in 1995 to rebuild his esophagus. TR 134; CX 13. He testified that his doctor has related this condition to retaliation and stress and recommended that he get out of DOE. As a result of the Respondent's retaliation, Byrum stated that he has been hurt and feels that he has no career left, and he testified that he has even begun to question his abilities. TR 134-35. In a letter dated July 13, 2000, Dean R. Conley, M.D., Byrum's treating gestroenterologist, reported that Byrum has suffered for many years from intermittent episodes of gastritis which are occasionally severe enough to require hospitalization. He further stated, "There is little question in my mind that many of his gastritis and peptic flare-ups have been related to work stress, and that work stress from time to time has significantly impacted his overall health, particularly from a gastrointestinal standpoint." CX 46. Although the medical evidence shows that Byrum's gastrointestinal problems existed before he first engaged in activity protected under the environmental statutes, I find that his credible testimony and Dr. Conley's report establishes that his preexisting condition has been aggravated by work-related stress, including the stress caused by the Respondent's repeated acts of unlawful retaliation because Byrum engaged in protected activities. In *Jones*, where the complainant had been unlawfully fired and suffered significant financial hardship, the ARB upheld an award of $50,000.00 in compensatory damages for the complainant's pain and suffering as comparable to awards in similar cases. *Id.* at 23. Byrum was not fired, there is no evidence that he has suffered any financial hardship which might have aggravated his emotional stress. Nevertheless, the evidence establishes that he has suffered significant pain and suffering, at least a portion of which is attributable to the Respondent's unlawful retaliation. Accordingly, I find that compensatory damages in the amount of $25,000.00 are appropriate.

Complainant Warden has been diagnosed with work-related major depression, severe occupational stress, irritable bowel syndrome and gastro-esophageal reflux disease. Extensive office notes from his treating physician, Michael A. Fisher, M.D., are in evidence and directly relate Warden's stress and depression during 1996 and 1997 to his reassignment out of the Personnel Security Branch. CX 30. The medical records also show that Warden has received ongoing psychotherapy since 1995. *Id*. Warden credibly testified that the Respondent's retaliation has changed him as a person and ruined his career. TR 303-10. Based on this credible and uncontradicted evidence, I find that Warden's psychological and physical problems were at least aggravated by the Respondent's unlawful retaliation. Considering the severity of his problems, I find that compensatory damages in the amount of $50,000.00 are warranted. Warden also introduced a bill from his treating psychologist, Charles S. Jones, Ph.D., which shows an outstanding balance of $353.77 after medical insurance payments. Accordingly, this unpaid balance will be added to Warden's compensatory damage award.

Complainant Johnson testified at trial that she experiences "stomach problems" and feels that she has lost career opportunities due to the Respondent's retaliation. TR 637-42. She also credibly testified that she suffered significant embarrassment and humiliation when she was demoted to clerical duties during the September 1999 ORO inspection. TR 634-36. Based upon her credible testimony, I find that Johnson is also entitled to an award of $2,500.00 in compensatory damages.

3. Exemplary Damages

The Complainants seek exemplary damages in light of the Respondent's misconduct at trial. Awards of exemplary damages serve as punishment for wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, USDOL/OALJ Reporter (HTML), OALJ Nos. 86-CAA-3, 4, 5 (Sec'y May 29, 1991) at 16. The decision whether to award punitive damages involves a "discretionary moral judgment"; *Smith v. Wade*, 461 U.S. 30, 52 (1983); *Silkwood v. Kerr-McGee Corp*., 769 F.2d 1451, 1461 (10th Cir. 1985); and the ARB has declined to make exemplary damage awards if the purposes of the statute can be served without resort to punitive measures. *Jones* at 23 n.20; *White v. The Osage Tribal Council*, USDOL/OALJ Reporter (HTML), OALJ No. 95-SDW-1 (ARB August 8, 1997) at 10. In this case, the matter of the Respondent's attempted spoliation of evidence appears to have been an isolated transgression, and I find that exemplary damages are not necessary to effectuate the purposes of the employee protection provisions of the environmental statutes.

4. Litigation Expenses

Counsel to the Complainants shall have 30 days from the date of this recommended decision and order to submit a detailed petition for an award of attorney fees and costs, and the Respondent shall have 30 days from the date any such petition is filed to submit any objections.

IV. Recommended Order

(1) The complaints filed on August 24, 1995, October 13, 1995, November 13, 1995, January 3, 1996, December 16, 1996, March 28, 1997, April 12, 1997 and June 13, 1997, alleging retaliation against Dennis McQuade, are dismissed.

(2) The Respondent, Department of Energy, Oak Ridge Operations Cease and desist any and all discrimination against the Complainants in any manner with respect to their compensation, terms, conditions or privileges of employment because of activities protected under 29 C.F.R. 24.2.

(3) The Respondent, Department of Energy, Oak Ridge Operations, shall rescind Kenneth Warden's detail and reassignment to the Directives Management Branch and reinstate Mr. Warden to his former position in the Personnel Security and Assurance Branch.

(4) The Respondent, Department of Energy, Oak Ridge Operations, shall rescind the June 28, 1999 Notice of Verbal Reprimand issued to Commie Byrum and expunge from its records any and all memoranda or other references to this action.

(5) The Respondent, Department of Energy, Oak Ridge Operations, shall pay to Commie Byrum compensatory damages in the amount of $25,000.00.

(6) The Respondent, Department of Energy, Oak Ridge Operations, shall pay to Kenneth Warden compensatory damages in the amount of $50,353.77.

(7) The Respondent, Department of Energy, Oak Ridge Operations, shall pay to Virginia Johnson compensatory damages in the amount of $2,500.00.

(8) The Respondent, Department of Energy, Oak Ridge Operations, shall post copies of the final order in this matter in the cafeteria at the ORO Federal Building and at least one other conspicuous place accessible to employees in the ORO Personnel Security and Assurance Branch for a period of 90 days.

(9) The Respondent, Department of Energy, Oak Ridge Operations, shall pay the Complainants' attorney fees and costs in the amount to be assessed in a supplemental decision and order.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).